Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127
	)	

COMMENTS OF VONAGE HOLDINGS CORP.

Brendan Kasper
Senior Regulatory Counsel
Vonage Holdings Corp.
23 Main Street
Holmdel, New Jersey 07733
(732) 444-2216

Dated: July 15, 2010

TABLE OF CONTENTS

Page

EXECUTIVE SUMMARY

The decision issued by the United States Court of Appeals for the District of Columbia Circuit in *Comcast Corp v. FCC* does not preclude the Federal Communication Commission (the "Commission") from imposing reasonable regulations on Internet access network management practices. The court's decision leaves the Commission free to develop a stronger tether to its statutory responsibilities in exercising such ancillary authority.

There are several substantive statutory responsibilities that support adoption of Internet access network management rules. For example, the practices of broadband Internet access network operators can have a significant effect on the public switched telephone network and the regulated services provided over it, thus establishing ancillary authority connected to Title II. Similarly, there is good reason to view Internet access network management rules as ancillary to the Commission's Title III authority over broadcast operations, and the Commission's Title III authority over spectrum used to provide mobile services is so broad that it is not clear that reliance upon *ancillary* authority is needed to regulate management of that spectrum. The Commission should also find that Section 254 grants it sufficient authority to establish a universal service support mechanism for broadband service.

If the Commission nevertheless reclassifies the transmission component of Internet access service as subject to Title II regulation, it should apply a "lighter touch" consistent with the forbearance outlined in the Notice of Inquiry. The experience of VoIP service is instructive; while such services have been subject to some Title II obligations for several years (albeit pursuant to exercises of ancillary authority), the VoIP market has continued to thrive. The Commission should similarly refrain from placing any "heavier hand" on broadband Internet access services, and instead allow these services to operate in a well-defined limited regulatory

framework. The Commission should also make clear that any reclassification applies *only* to broadband transmission services and does not extend to applications or content that are delivered or operate over broadband. Finally, it is essential under whatever approach the Commission takes (ancillary authority or reclassification) to establish exclusive federal jurisdiction and to preempt the field with respect to regulation of broadband Internet access services. The Commission's efforts at a "lighter" regulatory touch would be undermined to the extent that States and localities are left free to impose incremental (and varying) degrees of regulation on these services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127
	)	

COMMENTS OF VONAGE HOLDINGS CORP.

Vonage Holdings Corporation ("Vonage") submits its comments in response to the Notice of Inquiry ("NOI") issued by the Federal Communications Commission (the "Commission") in the above-captioned proceeding.

I. THE COMMISSION SHOULD NOT RETREAT FROM ANCILLARY AUTHORITY IN THE WAKE OF THE *COMCAST* DECISION.

Although the decision issued by the United States Court of Appeals for the District of Columbia Circuit in *Comcast Corp. v. FCC* represented a procedural setback in the Commission's long-standing efforts to preserve an open Internet,[1] the Commission should not view the decision as a comprehensive rejection of the authority to take any such action absent additional congressional imprimatur. The *Comcast* ruling called into question the *specific* invocation of ancillary authority underpinning enforcement of the Commission's *Internet Policy Statement*,[2] but it was by no means a comprehensive rejection of any exercise of ancillary authority.

---

[1] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

[2] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review–Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*; CC Docket Nos. 02-33, 01-

To the contrary, as Vonage explained in comments filed in the wake of *Comcast*,[3] that decision practically invites the Commission to develop a more robust and legally sustainable explanation for the exercise of ancillary authority. Indeed, the D.C. Circuit was careful to explain that its ruling did *not* preclude the Commission from exercising authority with respect to broadband Internet access network management practices. The court observed that the Commission has ancillary authority to impose "*some* kinds of obligations" over broadband Internet access services,[4] and simply tasked the Commission to identify with more specificity the substantive statutory responsibilities to which the exercise of such authority might be "ancillary."[5] Moreover, the *Comcast* court declined for procedural reasons to examine several sound statutory cornerstones for the exercise of ancillary authority, leaving the Commission with ample opportunity to rely upon these provisions (and others) in promulgating new rules to govern broadband Internet access network management practices.[6]

The Commission therefore remains empowered to exercise its ancillary authority if the proposed regulation addresses "interstate [or] foreign communication by wire or radio," and if the regulation is "reasonably ancillary to the effective performance of the Commission's various

---

337, 95-20 & 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) ("Internet Policy Statement")

[3] Reply Comments of Vonage Holdings Corp., GN Docket No. 09-191, WC Docket No. 07-52 (filed Apr. 26, 2010), at 15-17; *see also Ex Parte* Letter from Brendan Kasper, Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137, and 09-191 (NBP Notice #19), WC Docket No. 07-52 (dated Apr. 21, 2010).

[4] *Comcast*, 600 F.3d at 650 (emphasis in original).

[5] *Id.* at 661.

[6] *Id*. at 660 (rejecting arguments referencing Title II and Title III as "statutory responsibilities" to which the exercise of authority might be ancillary because the Commission failed either to cite them in the underlying order or to advance them on appeal).

responsibilities [as delegated to it by Congress in the Act]."[7] All that the Commission must do in the wake of *Comcast* is revisit the second prong of this test, and develop a stronger tether to its statutory responsibilities to justify exercising ancillary authority over broadband Internet access network management practices.[8]

II. THERE ARE SEVERAL SUBSTANTIVE STATUTORY RESPONSIBILITIES ON WHICH THE COMMISSION MAY RELY TO EXERCISE ANCILLARY AUTHORITY OVER BROADBAND INTERNET ACCESS NETWORK MANAGEMENT PRACTICES.

Vonage devoted a substantial portion of its Reply Comments in the "net neutrality" proceeding to analyzing the substantive statutory responsibilities to which an exercise of authority over broadband Internet access network management practices would be "ancillary." Rather than restate that analysis in its entirety, Vonage provides a brief summary and attaches hereto its prior comments for a more complete discussion of those issues.[9]

Title II: The Commission has invoked ancillary authority on numerous occasions to justify applying Title II obligations on information service providers, notwithstanding the fact that

---

[7] *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 168, 178 (1968); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (requiring that the Commission make "reference to the provisions of the Act" setting forth the responsibilities to which the proposed requirement is ancillary).

[8] *See Ex Parte* Letter from Gary L. Phillips, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-51 and 09-137, WC Docket Nos. 05-337 and 03-109 (dated Apr. 12, 2010), at 2 ("Notably, however, while the court in *Comcast* held that statutory 'statements of policy' … are, *standing alone*, an insufficient basis for the invocation of ancillary jurisdiction, … the court also recognized that when statutory policy statements are combined with other 'express delegations of authority,' the Commission may exercise ancillary jurisdiction over matters reasonably related to those policies and directives.")

[9] A copy of Vonage's prior Reply Comments in the "net neutrality" proceeding is provided as Attachment 1 to these Comments. *See* Section II.A. (pages 15 to 30) of the attached Reply Comments for discussion specifically with respect to the bases for an exercise of ancillary authority.

those entities are neither common carriers nor providers of telecommunications services.[10] In the present case, Section 201 and several other provisions of Title II can and should form the basis for regulation of broadband Internet access network management practices. The National Broadband Plan highlighted the intertwined nature of the public switched telephone network ("PSTN") and broadband networks operated by many of the same providers, and observed the "significant impact" that convergence is having on the PSTN.[11] The Commission identified just such a concern in ruling against Comcast initially, finding that Comcast's blocking practices could lead to harmful and costly traffic shifts to the PSTN.[12] The potential for disruption to VoIP services that could result from certain "network management" practices could provide another tie be-

[10] *See, e.g., IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Dockets Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10261-62, 10264 (2005), at ¶¶ 28, 31 (imposing 911 calling capability requirements on VoIP providers by reference to 47 U.S.C. §§ 151, 152(a), and 706); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6955-56 (2007), at ¶ 55 (citing §§ 151, 222, and 706 to extend CPNI rules to VoIP providers); *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 24 FCC Rcd 6039, 6044-47 (2009), at ¶¶ 9-13 (imposing Section 214 common carrier discontinuance requirements on VoIP providers pursuant to §§ 151, 214(a), and 706).

[11] National Broadband Plan, § 4.5, p. 59; *see also* Comments of NCTA (NBP Public Notice #25), GN Dockets Nos. 09-137, 09-51, and 09-47 (Dec. 22, 2009), at 3 ("Within this market-based transition to IP networks, there is still an important role for continued targeted government involvement."); Comments of AT&T (NBP Public Notice #25), GN Dockets Nos. 09-137, 09-51, and 09-47 (Dec. 21, 2009), at 3-4, 8 (discussing the need to "phaseout" the PSTN as an essential means of "achieving universal access to broadband").

[12] *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* Memorandum Opinion and Order, File No. EB-08-IH-1518, WC Docket No. 07-52, 23 FCC Rcd 13028, 13037-38 (2008) ("Comcast Order"), at ¶ 17.

tween an exercise of ancillary authority and Title II, as the effects of such disruption can spill over to traditional telephone services offered on the PSTN.[13]

Procedural constraints, however, precluded the D.C. Circuit from considering the merits of Section 201 and other operative provisions of Title II as the basis for ancillary authority. Thus, the very statutory responsibilities that may present the Commission with the best bases for exercising ancillary authority here are not at all affected by the *Comcast* decision.

Title III: *Comcast* did not reject the notion that the Commission could enforce rules with respect to network management practices as ancillary to Title III; rather, the court concluded that the Commission had not adequately explained how such regulation would affect its ability to carry out Title III broadcasting responsibilities.[14] To provide such explanation, the Commission should make a factual finding that broadband Internet access service can be used in ways that are similar to, compete with, and affect broadcast operations regulated under Title III, and recognize the substantial impact that discriminatory network management practices by broadband Internet access providers could therefore have on local broadcasters.[15]

Moreover, Title III confers substantial authority upon the Commission with respect to the spectrum used to provide mobile services. In fact, the Commission's spectrum licensing authority is sufficiently broad that it may not even need to reach the question of whether it has *ancillary*

---

[13] Brief for Respondents, *Comcast Corp. v. FCC*, D.C. Cir., No. 08-1291, at 45 ("VoIP can affect prices and practices (addressed by 47 U.S.C. §§ 201(b) and 205) as well as network interconnections and the ability of telephone subscribers to reach one another ubiquitously (addressed by 47 U.S.C. § 256).") Indeed, the Commission has previously found on several occasions that VoIP services have such an effect on the PSTN that it was justified in exercising ancillary authority to impose certain Title II regulations on them. *See* footnote 10, *supra*.

[14] *Comcast*, 600 F.3d at 660.

[15] *See Southwestern Cable Co.*, 392 U.S. at 174-76 (upholding the Commission's authority to prohibit cable television systems from importing distant broadcast signals into other markets in order to protect local broadcasting).

authority to regulate network management practices on wireless broadband Internet access networks.[16] But at the very least, there is good basis for the Commission to establish its ancillary authority to ensure that the effective use of spectrum is not undermined through unreasonable or discriminatory practices.

Section 706: Section 706 of the Telecommunications Act of 1996 is not an aspirational policy statement. It is a mandatory directive for the Commission to "encourage the deployment on a reasonable and timely basis of advanced communications capability."[17] The *Comcast* decision does not foreclose reliance upon Section 706 as a "statutory responsibility" to which an exercise of authority may be ancillary. The D.C. Circuit's decision was premised upon the Commission's failure to explain why it departed from a prior interpretation that Section 706 did not constitute an independent grant of authority.[18] As explained in the attached comments, there is ample reason and basis for the Commission to clarify now why Section 706 confers substantive authority to develop and enforce regulatory policies governing broadband networks.

III. SECTION 254 CONFERS AUTHORITY TO SUPPORT BROADBAND INTERNET ACCESS THROUGH UNIVERSAL SERVICE.

Vonage previously supplied the Commission with a detailed analysis explaining how Section 254 of the Act provides all the authority needed to establish a universal service support mechanism for broadband service. In lieu of repeating this discussion, Vonage summarizes that analysis here and has provided a copy of it as Attachment 2 to these Comments.

Congress was careful in the Telecommunications Act of 1996 to make clear that the definition of universal service should evolve over time and reflect the current state of technology.[19]

---

[16] *See* 47 U.S.C. § 301 and 303.

[17] *Id*. at § 1302(a).

[18] *Comcast*, 600 F.3d at 658-59.

[19] 47 U.S.C. § 254(b)(2) and (3).

Congress also indicated that the Commission should ensure through its universal service policies that consumers in rural, insular, and high-cost areas throughout the United States have access to the same kinds of advanced services that consumers in urban areas have.[20] Although some may assert that the statute limits high-cost support to only "telecommunications service,"[21] this narrow reading would defeat the express will of Congress and perpetuate (and exacerbate) a substantial divide between access to broadband in rural and urban areas.[22] At worst, Section 254 is ambiguous on this point – and under such circumstances, the Commission should "be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties."[23] As the agency charged with administering the Act, the Commission has the authority to resolve any ambiguity within Section 254 in favor of the clear congressional preference to promote equal access to advanced services.[24] Thus, while the Commission certainly could cite to its ancillary authority as an *additional* basis for establishing a mechanism to support broadband Internet access, the Commission should find in the first instance that Section 254 of the Act confers direct authority to establish such a support mechanism.

IV. IF THE COMMISSION RECLASSIFIES THE INTERNET CONNECTIVITY PORTION OF BROADBAND INTERNET ACCESS SERVICE AS TITLE II, IT SHOULD APPLY THE "LIGHTER TOUCH" TO REGULATION AND ALSO MAKE CLEAR THAT SUCH RECLASSIFICATION HAS NO IMPACT ON IP-BASED APPLICATIONS.

As discussed above and in Vonage's prior filings, the Commission has successfully used its ancillary authority to apply a series of Title II-oriented regulations to services that have never

---

[20] *Id*. at § 254(b).

[21] *See id*. at § 254(c)(1).

[22] *See, e.g.*, National Broadband Plan, § 4.1, pp. 37, 39 (discussing the limited choices for and lack of availability of broadband access in rural areas); *Bringing Broadband to Rural America*, Report on a Rural Broadband Strategy, Acting Chairman Copps, Federal Communications Commission (May 2009), at ¶ 27 (identifying statistical disparities in broadband access and adoption between rural and urban areas).

[23] *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968).

[24] *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

been considered common carrier offerings or telecommunications services. This experience demonstrates that the key is not the classification of the service, but a sufficient explanation as to why a particular exercise of ancillary authority fulfills or affects a substantive statutory responsibility. In lieu of tackling the thornier question of classification (even with forbearance) and inviting a raft of new legal challenges, the Commission should opt for a narrower and legally sustainable approach by relying upon its ancillary authority to adopt proposed rules with respect to management of broadband Internet access networks.

Although ancillary authority represents a more straightforward, less intrusive, and less controversial means to achieve the same end, the Commission could choose to proceed with service reclassification to ensure the preservation of an open Internet and promote other important policy objectives such as universal access to broadband. If it takes this route, however, the Commission should be careful to apply a "light touch" along the lines of the forbearance measures suggested in the NOI. Despite the claims of those who treat reclassification as if the sky were prepared to fall, there should be little, if any, negative practical impact if reclassification is coupled with forbearance as outlined in the NOI. The experience of VoIP services is instructive in this regard; VoIP services have been subject for several years to a very similar limited regulatory framework (albeit, under exercises of ancillary authority) as is now contemplated for broadband Internet access service, and yet the VoIP market has thrived. Indeed, if anything and as discussed further in the section that follows, the certainty afforded by having such services subjected to a relatively "light" but relatively well-defined uniform regulatory framework – in lieu of a "heavier" patchwork of regulation at the federal and state levels – has promoted growth and investment in the VoIP market. Consumers of such services have in turn been the primary beneficiaries of such growth in the form of greater competition, lower prices (*e.g.*, bundled

discounts), expanded service offerings (*e.g.*, flat-rate plans), and technological innovations (*e.g.*, nomadic access) that were barely envisioned a decade earlier.[25]

Moreover, if the Commission is determined to proceed with service reclassification, it should limit any determinations in this regard to broadband *transmission* services, and be careful to indicate, explicitly in the final order, that such a decision does *not* extend to applications or content that are delivered or operate over broadband. There is no need or justification to treat IP-delivered applications or content as telecommunications services. Taking Vonage's VoIP service as an example, the Commission has already found it possible to subject that service to a variety of Title II obligations without deeming the service that Vonage offers to be subject to Title II. The Commission has not considered the potentially far-reaching impact of Title II regulation on the market for IP-based applications and content, nor is there any basis to believe that rules are needed to address barriers to entry or concerns about other practices in the market for IP-enabled applications and content. To the contrary, without regulation as common carriers and only targeted application of certain Title II obligations on an "as-needed" basis, the Commission has promoted entry into and participation in the market for IP-based applications and content, consistent with Congressional policy.[26]

---

[25] Despite having nearly no market presence a decade ago, VoIP subscriptions represented 13% of total retail "local telephone" connections as of year-end 2008, and nearly 20% of retail residential connections as of the same date. *See Local Telephone Competition: Status as of December 31, 2008*, Industry Analysis Division, Wireline Competition Bureau (June 2010), at Figures 1 and 3. As a few further examples of growth, Vonage's customer base has grown from less than 8,000 VoIP subscribers to more than 2.4 million, and Comcast has indicated in its public reports that its VoIP customer base increased from just over 300,000 in the fourth quarter of 2005 to 6.8 million in the first quarter of 2009.

[26] *See* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States – to preserve the vibrant and competitive free market that exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.")

V. THE COMMISSION SHOULD MAKE CLEAR THAT ITS REGULATION OF BROADBAND INTERNET ACCESS SERVICES (BY WHATEVER THEORY) PREEMPTS ANY STATE REGULATION OF SUCH SERVICES.

Regardless of whether the Commission employs a narrower foundation based upon ancillary authority or undertakes the broader effort of reclassification, it is essential under either approach to establish exclusive federal jurisdiction over such services (given their jurisdictionally mixed, interstate nature) and to preempt the field with respect to regulation of them. Although it is true that VoIP services have flourished in recent years under a regime of only targeted and limited federal regulation as discussed above, it is not only the *level* of regulation that has been critical to this development – the determination that such services are interstate in nature and the associated preemption of state regulation of these services has in fact been just as, if not more, important in enabling the rapid and sustained growth of VoIP services. Vonage can attest firsthand that the ability to enter markets quickly and to streamline operations by complying with a uniform federal regulatory framework rather than navigating a patchwork of 50-plus different State regulatory regimes has been crucial in promoting the deployment and widespread availability of VoIP services. Looking to this model and in the interest of ensuring that broadband Internet access services similarly thrive, the Commission should make clear in whatever approach it adopts that the resulting federal regulations have the effect of preempting State and local regulation of such services.[27]

[27] *See, e.g., Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, 19 FCC Rcd 22404-5 (2004), at ¶ 1 (preempting any state application of traditional "telephone company" regulations to certain VoIP services).

VI. CONCLUSION

For the foregoing reasons, the Commission should exercise its ancillary authority with reference to its Title II, Title III, and Section 706 responsibilities to adopt reasonable rules governing broadband Internet access network management practices. The Commission should further establish a universal service mechanism to support the availability of broadband Internet access services pursuant to its authority under Section 254 of the Act. Finally, the Commission should confirm that the regulatory framework it establishes with respect to broadband Internet access services preempts any imposition of traditional "telephone company" regulations by a State or local entity on the provision of such services.

Respectfully submitted,

/s/ Brendan Kasper
Brendan Kasper
Senior Regulatory Counsel
Vonage Holdings Corp.
23 Main Street
Holmdel, New Jersey 07733
(732) 444-2216

Dated: July 15, 2010

ATTACHMENT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
	)	

REPLY COMMENTS OF VONAGE HOLDINGS CORP.

Brendan Kasper
Senior Regulatory Counsel
Vonage Holdings Corp.
23 Main Street
Holmdel, New Jersey 07733
(732) 444-2216

Dated: April 26, 2010

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

EXECUTIVE SUMMARY

The record in this proceeding reflects ample justification for the Federal Communications Commission ("the Commission") to adopt its proposed rules aimed at preserving an open Internet. Over a relatively short period of time, the Internet has become the most critical medium by which Americans communicate with one another, transact business, and engage in political and civic debate and discourse. Given its central importance to such fundamental activities, it is critical for the Commission to be on guard against those who have the incentives and capabilities as network operators to act as "gatekeepers" for certain content and applications. Although the Commission previously adopted "principles" aimed at this purpose, it has become clear by virtue of judicial ruling that these principles standing alone will not ensure the preservation and promotion of an open Internet. Moreover, while some would argue that "market forces" will ensure good behavior, there is insufficient evidence of robust competition to leave such important issues to such markets. Thus, the Commission should take more forceful and direct action, through this rulemaking, to ensure that the principles embodied in prior policy carry the force of law.

The Commission has the necessary authority to adopt the proposed rules. Some network operators and their allies are already asserting that the Commission has *no* authority in the wake of the *Comcast v. FCC* ruling, but such arguments carry this court decision too far. The Court of Appeals did not render a general opinion on the extent of the Commission's authority; rather, it merely found unpersuasive the Commission's asserted grounds for exercising ancillary authority in one particular decision. Nothing in the *Comcast* decision precludes the Commission from developing a more robust justification for the exercise of authority in support of the proposed rules -- and, as explained in much greater detail herein, several statutory provisions, such as

Sections 201 and 301, provide substantial support and a more firm statutory tether for adoption of the proposed rules.

Opponents of the proposed rules also fall short in parading out other "horribles" with respect to the proposed rules. For example, claims that it would be "arbitrary and capricious" to adopt the rules miss the mark. The Commission need not await a rash of discriminatory and anticompetitive behavior prior to taking action to protect against such behavior; to the contrary, it is well-settled that the Commission has authority to adopt "prophylactic" rules where there is a "substantial enough probability" of discrimination to give rise to concern. The proposed rules represent a thoughtful and proportionate response to such concerns. Moreover, although various network operators claim that the rules would infringe their First Amendment rights, the rules would in fact *safeguard* such rights. The proposed rules are content-neutral, affecting only the transmission aspects of a network operator's business, and they easily satisfy First Amendment scrutiny as explained further herein.

Given their fundamental importance to American social, economic, and political activity, the proposed rules should apply with equal force to all broadband Internet access services. Consumers using such services expect to reach applications and content of their choosing; they do not expect the provider to limit or preclude access because the device in question happens to be wireless. Although some contend that unique aspects of wireless networking dictate differing treatment for wireless devices, these arguments present a false "either/or" choice. The proposed rules offer more than sufficient flexibility in the form of a carve-out for "reasonable network management." If different network management practices are indeed required in light of the ways in which wireless networks operate, this carve-out should offer adequate protection for the network operator -- but the Commission should not take the bait and give wireless network

operators a complete pass on compliance under the theory that they need more flexibility in managing such networks.

As part of its proposed rules, the Commission should also adopt an explicit prohibition on the imposition of *any* "access charges" in connection with broadband Internet access services. It would undermine, if not gut, the proposed rules if a network operator could impose charges on application and content providers for access to the operator's subscribers, and would extend a model that is already in the process of being phased out in the world of the public switched telephone network.

Finally, Vonage has submitted as Attachment 1 to these Reply Comments its suggested revisions to the proposed rules consistent with the discussion herein and in its initial Comments in this proceeding.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
	)	

REPLY COMMENTS OF VONAGE HOLDINGS CORP.

Vonage Holdings Corporation ("Vonage") hereby replies to the comments filed in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission (the "Commission") in the above-referenced proceeding.[1]

I. THE COMMISSION HAS AMPLE JUSTIFICATION TO ADOPT THE PROPOSED RULES

A. Adoption of the Proposed Rules is a Logical and Necessary Next Step in the Effort to Preserve an Open Internet.

The Internet has served "as an engine for productivity growth and cost savings," having a "profound impact on American life" and providing "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[2] These overarching sentiments are supported by the parties here and many others who

[1] *Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191,WC Docket No. 07-92, FCC 09-93 (rel. Oct. 22, 2009) ("NPRM"). Vonage has submitted as Attachment 1 to these Reply Comments its suggested revisions to the proposed rules consistent with the discussion herein and in its initial Comments in this proceeding.

[2] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review–Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*; CC Docket Nos. 02-33, 01-

have noted the numerous social and economic benefits flowing from communications capabilities, applications, and content accessible via the Internet.[3] These benefits did not arise within a regulatory vacuum, however, and it cannot be taken for granted that such benefits will continue as the incentives and capabilities to control broadband Internet access at the network layer increase.[4] Indeed, the Commission has made substantial efforts to ensure that the Internet remains an open and transparent environment driven by the demands of consumers rather than by the unilateral decisions of network gatekeepers. From investigating and addressing case-by-case instances of misconduct[5] to adoption of the *Internet Policy Statement* as a framework to "preserve and promote the open and interconnected nature of the public Internet,"[6] the Commission

337, 95-20 & 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) ("Internet Policy Statement"), at ¶ 1.

[3] *See, e.g.*, Comments of Vonage Holdings Corp., GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("Vonage Comments"), at 1-5; Comments of AT&T Inc., GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("AT&T Comments"), at 5-6; Comments of T-Mobile USA, Inc., GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("T-Mobile Comments"), at 1; Comments of Google Inc., GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("Google Comments"), at 4-18; *see also* Bill D. Herman, Opening Bottlenecks: On Behalf of Mandated Network Neutrality, 59 Fed. Comm. L.J. 103, 109 (2006) ("As neutral and therefore controlled platforms, both the Internet generally and the Web specifically have spawned a dazzling rate and range of innovation.")

[4] *See* Barbara van Schewick, Towards an Economic Framework for Network Neutrality Regulation, 5 J. on Telecomm. & High Tech. L. 329, 378 (2007) ("[T]he threat of discrimination reduces the amount of application-level innovation."); Herman, Opening Bottlenecks, *supra* note 3, at 110 ("Threats to network neutrality could reduce the level and variety of online innovation.").

[5] *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* Memorandum Opinion and Order, File No. EB-08-IH-1518, WC Docket No. 07-52, 23 FCC Rcd 13028 (2008) ("Comcast Order"); *Madison River Communications, LLC*, Order, 20 FCC Rcd 4295 (2005) ("Madison River Order"); Letter from James D. Schlichting, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to James W. Cicconi, Senior Executive Vice President-External and Legislative Affairs, AT&T Services, Inc., DA 09-1737, RM-11361, RM-11497 (July 31, 2009) (investigating the blocking of certain VoIP applications on the iPhone and AT&T network).

[6] *Internet Policy Statement*, at ¶ 4.

has been both proactive and quick to respond to efforts by network operators that threaten to prohibit or "ratchet" consumer access to applications and content of their choosing.

As the recent decision by the United States Court of Appeals for the District of Columbia to vacate the *Comcast Order* makes clear, however, the *Internet Policy Statement* principles alone will not ensure the preservation and promotion of an open Internet.[7] The court's decision confirms the need for more forceful and direct action to ensure that the principles embodied in that policy carry the force of law and serve as a meaningful deterrent to those who threaten to dash consumer expectations and undermine the open nature of the Internet. The uncertainty arising in the wake of *Comcast v. FCC* leaves the door open for potential misconduct and will cause substantial concern among investors and innovators seeking to enter (or fund entry into) Internet-related ventures. By contrast, this rulemaking process will establish regulatory certainty and promote market certainty – providing consumers with reassurance in their expectations with respect to an open Internet, giving network operators a clearer understanding of their obligations, giving application and content providers more confidence as to the treatment of their products and services, and affording investors and the industry more transparency into the requirements applicable to access to and transmission of data and applications via the Internet.[8]

---

[7] *Comcast Corp. v. FCC*, No. 08-1291 (Apr. 6, 2010).

[8] Indeed, even those who opposed the *Comcast Order* recognize the untenable vacuum that now remains in the wake of the *Comcast v. FCC* ruling; as the Chief Executive of the National Cable & Telecommunications Association ("NCTA") observed a few days after the court decision, "While in the short run it's clearly a reaffirmation of status quo, which is good news, it raises uncertainty in terms of a regulatory or legislative response." *Comcast ruling raises questions on FCC regulation*, Washington Post, Apr. 8, 2010 (available at: http://www.washingtonpost.com/wp-dyn/content/article/2010/04/08/AR2010040802554.html).

B. The Comments Confirm the Substantial Need for Nondiscrimination and Transparency Rules.

In addition to the need for regulatory certainty with respect to enforceability of the four existing principles, developments since adoption of the *Internet Policy Statement* make it necessary to establish an express prohibition on discrimination and a firm commitment to transparency in network management disclosures.

1. Nondiscrimination

With respect to discrimination, the *incentives* and *capabilities* of network operators have changed over the past several years. In terms of *incentives*, increasing service convergence and vertical integration prompt broadband providers toward more "closed" environments, whereby firms seek to "lock-in consumers and lock out competitors."[9] A network operator often has substantial financial interest in serving as a gatekeeper, favoring its own content or that of its affiliates over data or applications published or produced by third parties. The cable television industry provides a particularly apt illustration of the concerns that can arise where the same firm has a vested interest in both "content and conduit."[10] Indeed, the financial incentives for such conduct may be twofold. First, affording preferential treatment to a network operator's own applications and content (or that of its affiliates, partners, and customers) could result in consumers finding them more desirable – leading to the selection of "winners" and "losers" among applications and content based primarily upon their tether to the network over which they are accessed. Second, a network operator could generate substantial revenues by developing a fee-based "product" whereby nonaffiliated application or content providers pay for more favorable (or at least "no less favorable") treatment of consumer access to their offerings.[11]

---

[9] *See* Google Comments at 29.

[10] *Id* at 30.

[11] *See* NPRM, at ¶ 58 (observing that new technologies could allow prioritizing techniques that "may be provided only to an Internet access service provider's own affiliates and partners.

Likewise, with respect to *capabilities*, the Commission has noted the increasing ability of broadband Internet access service providers to "ensure that one class of traffic enjoys a greater share of capacity than another when there is contention for resources," and to "differentiate among different packet streams or classes of traffic by scheduling the transmission of certain packets … ."[12] Google's comments provide a detailed examination of the network management technologies that have emerged over the past several years and the capabilities of these tools to enable discrimination among applications.[13] Moreover, as the Center for Democracy & Technology observes, if the Commission does not take action now to clarify how certain tools can be used, "it would likely be extremely difficult to reverse the damage after-the-fact" in light of the investments made and business plans developed based upon the use of such technologies and practices.[14]

Several non-economic factors also support the adoption of a nondiscrimination rule. The Internet's significance as a platform for communication and free expression cannot be overstated. Indeed, the very same entities who object here to even the most basic regulation of the broadband networks by which more and more Americans are communicating have urged the Commission elsewhere to recognize the importance of these networks as the foundation for communications moving forward.[15] The National Broadband Plan confirms this migration to

---

Or they may be turned into a service that Internet access service providers offer to content and application providers for a fee.")

[12] *Id*. at ¶ 57.

[13] Google Comments at 32-34.

[14] Comments of the Center for Democracy & Technology, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010), at 6.

[15] *See, e.g.*, Comments of AT&T Inc., GN Docket No. 09-51 (filed June 8, 2009), at 32-33 ("Networks will need to provide the performance capabilities required by the increasingly diverse array of services, applications, and content traveling over them, and, at the same time, those services, applications, and content will similarly need to adapt to function properly on different types of networks."); Declaration of Michael L. Katz, at ¶ 5 (attached to *Ex Parte* Letter

broadband networks as our primary communications infrastructure, noting that "broadband is not a discrete, complementary communications service. Instead, it is a platform over which multiple IP-based services – including voice, data, and video – converge."[16] Certainly, if interactions among Americans are migrating to broadband networks as these providers recognize and the National Broadband Plan confirms, the Commission has good reason to ensure that these networks do not result in "closed" communities where certain Americans are precluded from communicating with one another or limited in accessing applications or content of their choosing. This is particularly true for individuals and groups who might otherwise lack the ability to publish their opinions and engage in civic discourse. As Public Knowledge has stated, "Preserving the open Internet will promote free expression, political discourse and social interaction for all Americans… . Discriminatory behavior by [Internet Service Providers ("ISPs")] poses the threat of jeopardizing these crucial interactions."[17]

Congress predicted the increasing importance of an open Internet in American communications, and emphasized the paramount need to ensure that discriminatory conduct does not undermine the benefits expected to flow from Internet access. As Free Press explains, the Tele-

---

from David Young, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 (filed Sept. 11, 2009)). ("Broadband networks can serve as a fundamental platform on which many other activities can build to provide valuable goods and services. As recognized by Congress and the Commission, broadband networks are a vital component of the 21st century national infrastructure."); Comments of Comcast Corporation, GN Docket No. 09-51 (filed June 8, 2009), at 8 ("*[B]roadband networks* often serve as a platform for the delivery of a multiplicity of services, including *broadband Internet services*.") (emphasis in original).

[16] *Connecting America: The National Broadband Plan* ("National Broadband Plan"), at § 4.5, p. 59; *see id*. at § 4.3, p. 52 ("Over the last 10 years, there has been phenomenal growth in the applications and content available over broadband networks. Whole new markets have emerged, while others have migrated – partially or totally – online.")

[17] Comments of Public Knowledge, *et al*., GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("Public Knowledge, *et al*. Comments"), at 24-25.

communications Act of 1996 recognized that deregulation of services under the Commission's jurisdiction had to be predicated on the existence of conditions that would protect consumers, not merely the presence of minimal competition. "Congress allowed the discontinuance of regulations so long as they were not needed to ensure a specific desired outcome – *just, reasonable and non-discriminatory treatment*."[18] In other words, Congress has charged the Commission to ensure that concerns with respect to discrimination are resolved *even if there is competition in the relevant product and geographic market.* Given the clear congressional interest in discrimination concerns and the outstanding questions surrounding the scope and enforceability of the *Internet Policy Statement*, the adoption of an affirmative nondiscrimination rule is warranted.

2. Transparency

There is also good reason for the Commission to adopt its proposed transparency rule. Existing network management disclosures are often anything but clear or consistent. As Public Knowledge, *et al*. point out, "Transparency lies at the heart of an open Internet."[19] Yet "[p]roviders of Internet access service currently disclose little information about active impediments placed on user communications."[20] A transparency rule is therefore necessary "to permit consumers to understand the broadband provider's network and pricing practices, as well as the technical features and limitations of the services."[21] A transparency rule would also benefit

---

[18] Comments of Free Press, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("Free Press Comments"), at 46 (emphasis in original) (citing 47 U.S.C. §§ 160 and 332(c)(1)(A)).

[19] Public Knowledge, *et al.* Comments at 63.

[20] Free Press Comments at 112.

[21] Google Comments at 65 (citing Network Reliability and Interoperability Council VI, *Focus Group 4 – Broadband*, 10 (Dec. 5, 2003), *available at* www.nric.org/fg/charter_vi/fg4/NRIC6FG4-Completed.pdf (recommending that service providers make information available to their customers regarding traffic policies, content filtering, expected upstream and downstream performance)).

consumers indirectly by allowing application, content, and service providers to design applications that "work effectively and efficiently" on broadband networks and "to ensure compatibility over time" as those networks evolve.[22] Finally, a transparency rule would serve the paramount objective of safeguarding "the benefits of the Internet for American consumers" by empowering them to understand and compare the limits that different providers may place on the exercise and enjoyment of those benefits.[23] Thus, the Commission should expand the scope of the existing *Internet Policy Statement* principles to ensure that Internet access providers cannot discriminate against applications, content, or services demanded by their customers and that consumers have a more complete understanding of what network management tools might impinge upon their ability to access such applications, content, or services.

C. Claims that There is No Need for the Proposed Rules are Unavailing and Contrary to the Public Interest.

1. Competition Does Not Eliminate the Need for the Proposed Rules.

Several commenters assert that there is no need for codification of the existing *Internet Policy Statement* principles or adoption of nondiscrimination or transparency rules because the "market" (*i.e.*, competition) will address any and all such concerns. For example, AT&T contends that the amount of churn in broadband subscribership and the ability of consumers to "cancel their broadband service whenever they believe they can get better service or a better price" from another provider obviates the need for such "monopoly-style regulations."[24] Verizon similarly argues that a transparency rule is unnecessary because "the highly competitive market

[22] *See* Google Comments at 66 (quoting Letter from Lawrence Strickling, Assistant Secretary for Communications and Information, Department of Commerce, to Julius Genachowski, Chairman, FCC, GN Docket No. 09-51, (Jan. 4, 2010) ("*NTIA Letter*"), at 7).

[23] *See* NPRM, at Statement of Commissioner Copps.

[24] AT&T Comments at 83-85; *see also* Comcast Comments at 9-10.

for broadband services means that providers have a strong incentive to develop and maintain a reputation for treating customers fairly – which includes providing clear and accurate information that is material to consumers in choosing what products and services to use."[25]

Such reliance upon theoretical competition as a substitute for sensible regulation is not borne out by the facts. Indeed, it is ironic that Verizon chides the Commission for "[l]acking any factual justification for its proposed rules"[26] even as network operators such as AT&T, Verizon, and Comcast rely upon broad, unverifiable claims about the state of competition to fend off the proposed rules.[27] The U.S. Department of Justice has observed that "[u]ltimately what matters for any given consumer is the set of broadband offerings *available to that consumer … .*"[28] But there is insufficient data to determine with any granularity whether there is competition in each broadband market,[29] meaning that reliance upon competition to ensure consumer protection would entail a substantial and unsupported leap of faith. Indeed, there is a significant likelihood that the market is not fully (or at all) competitive in many places.[30] As Vonage has informed the

---

[25] Comments of Verizon and Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("Verizon Comments"), at 49.

[26] *Id*. at 2.

[27] *See, e.g.*, AT&T Comments at 82-84 (citing the Commission's deregulation of broadband Internet access services, customer "churn," and the availability of wireless services as evidence of competition); Verizon Comments at 15-16 (citing the Commission's deregulation of broadband Internet access services, cable competition, and the availability of wireless services as evidence of competition). It should go without saying that telco-cable competition (where there is indeed any overlap) and the availability of wireless services (for which most customers are served by AT&T or Verizon as described further in Section III.A., *infra*) does little to dispel the sense of a duopoly in the broadband Internet access market.

[28] Ex Parte Submission of the U.S. Department of Justice, GN Docket No. 09-51 (filed Jan. 4, 2010) ("*DOJ Ex Parte*"), at 7 (emphasis added).

[29] *See* Federal Trade Commission Staff Report, *FTC Broadband Connectivity Competition Policy*, at 105 (June 2007) ("*FTC Broadband Competition Report*"), *available at*: http://www.ftc.gov/reports/broadband/v070000report.pdf.

[30] *See DOJ Ex Parte*, at 7 ("Competitive conditions [for broadband services] vary considerably for consumers in different geographic locales.").

Commission previously, consumers in many areas of the country have access to only a single broadband service provider.[31] The National Broadband Plan confirms the dire state of competition, finding that the fixed broadband Internet access market is *at best* a duopoly for most Americans; specifically, the plan reports that *only 4%* of households have access to three wireline providers, 78% have access to two wireline providers, 13% are in areas with only a single wireline provider, and 5% have no options at all for fixed wireline broadband Internet access. The plan further cautions that these figures do not necessarily mean that 82% of customers have 2 or 3 effective options for wireline broadband service, because the underlying data does not take into account the extent of true head-to-head competition in a given area or the various pricing or performance alternatives to subscribers.[32] And while AT&T claims that the broadband market "is more competitive now than it was in 2005," available data on the prices at which consumers obtain broadband Internet access indicates otherwise.[33]

Thus, appeals for the Commission to rely upon "market forces" as a substitute for sensible regulation amount to little more than pleas to give network operators free rein to impose their unilateral views of what might constitute an "open" Internet. Although the *Internet Policy*

---

[31] *See* Comments of Vonage Holdings Corp., GN Docket No. 09-40 (filed Apr. 13, 2009), at 2-3; *see also* Daniel L. Brenner, "Creating Effective Broadband Network Regulation," 62 Fed. Comms. Law J. 1 (2010), at 25 ("If anything, policymakers aspire to insure that all Americans have access to at least one or perhaps two ISPs.")

[32] National Broadband Plan at § 4.1, p. 37; *see also* FCC National Broadband Plan, September Commission Meeting, at 135 (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293742A1.pdf.). ("50-80% of homes may get [the] speeds they need from only one provider"). The National Broadband Plan also notes that while there may be other types of fixed broadband service available in a given area, such as wireless Internet service and/or satellite, "their services tend to be more expensive or offer a lower range of speeds than today's wireline offerings." National Broadband Plan at § 4.1, p. 37

[33] *See* Pew Internet and American Life Project, *Home Broadband Adoption 2009*, June 2009, at 25-26 (finding that the average reported monthly cost of broadband services increased from $36 to $39 between 2005 and 2009).

Statement may have helped to deter such unreasonable conduct in the past, the open questions regarding the scope and enforceability of those principles leave a vacuum that must now be filled by rules rather than a reliance upon unsubstantiated competition. This is particularly true for vulnerable populations, as "it is insufficient to rely solely on market forces to provide fair and reasonable prices for access to networks. Incumbents motivated purely by market forces have every incentive to build out to and discriminate in favor of their most profitable customers. Those customers are rarely the economically disadvantaged, nor any of the disadvantaged groups whose members correlate with the economically disadvantaged."[34] Nor can the Commission rely upon technological change to fill this gap and to deliver a competitive threat anytime soon. For example, there is substantial uncertainty about "whether wireless broadband offerings will be able to exert a significant degree of competitive constraint on cable modem, DSL or fiber-based services."[35] In the end, even if "the current high-speed ISP market is characterized by swift technological change … the overall level of competition is sub-optimal. The latter factor means that regulators must be vigilant to ensure that the lack of competition and presence of market power do not spill over from the ISP market into the adjacent content and applications markets."[36]

In fact, even a greater degree of broadband competition would be insufficient to ensure an open Internet. As Google notes, where consumers have choices, they "are typically 'locked-in' to multi-year service contracts that carry early termination penalties. … There is also the hassle, cost, and inconvenience of a new installation and the costs and inconveniences associated

---

[34] Public Knowledge, *et al*. Comments at 27-28.

[35] Google Comments at 21 (quoting *DOJ Ex Parte*, at 8); *see also NTIA Letter*, at 4.

[36] Free Press Comments at 14.

with abandoning and switching email accounts."[37] Such factors preclude customers from exercising the kind of pressures on discriminatory conduct or unreasonable practices that Verizon and others claim make formal rules unnecessary.[38]

Moreover, a more competitive market would not solve the terminating access monopoly problem, which results from the broadband network operator being a monopolist for anyone seeking to deliver content or applications over the broadband network to a customer served by the network.[39] This can reduce the incentive for content or application providers to innovate because the network operator can extract some of the value of the content or applications by charging for access to the broadband network subscriber – even as the network subscriber has paid for a connection believing that he or she will obtain the right to access the content or application of his or her choosing via that connection. The question of what charges, if any, should be permitted in connection with such "terminating access" is discussed further in Section IV below. But the very prospect of an exercise of power by a firm holding a terminating access monopoly – and the fact that such a monopoly will exist even within "competitive" markets – should prompt adoption of the proposed rules rather than leaving the promise of an open Internet in the hands of network operators with the capabilities and incentives to limit or ratchet access.

[37] Google Comments at 22.

[38] *See, e.g.*, Verizon Comments at 2 ("Competitive pressures and the need to attract and keep customers to generate revenues to finance continued investment mean that broadband access providers have strong incentives to satisfy consumer demands, including for public Internet services that provide access to lawful content and applications.")

[39] *See, e.g.*, Free Press Comments at 30-32 ("… even carriers without market power are prone to abusing their position as terminating access monopolies"); *FTC Broadband Competition Report*, at 77.

2. The Proposed Rules Will Not Deter Investment.

Claims that adoption of the proposed rules would deter private investment in broadband networks[40] fly in the face of substantial evidence to the contrary and ignore the public interest in these networks. The debate over net neutrality is hardly new – questions about and the demands for such regulations swirled for years before the Commission adopted the *Internet Policy Statement*.[41] Yet as Free Press showed in its comments, historical patterns indicate that, if anything, appropriately tailored regulation may have a positive effect on network investment, while deregulation and consolidation may decrease capital investment.[42] Indeed, there may be no better evidence of the invalidity of these "chilled investment" arguments than the conduct of AT&T, which in the wake of its merger commitment to enforceable net neutrality principles substantially *increased* its capital investment – even as other broadband Internet access service providers (which were not subject to the same commitments) *reduced* their capital investments over the same period.[43] By contrast, the "evidence" offered by opponents of the proposed rules consists largely of unsubstantiated claims that "no company will invest millions of dollars in business plans that an unpredictable regulator might outlaw several years later"[44] and a handful of comments by financial analysts and economists offering insights such as "less regulation is better regulation."[45]

---

[40] *See, e.g.,* Comcast Comments at 11-12.

[41] *See, e.g., Ex Parte* Presentation of the Coalition of Broadband Users and Innovators, CS Docket No. 02-52, CC Dockets Nos. 02-33, 98-10 and 95-20, and GN Docket No. 00-185 (filed Oct. 1, 2003), at Slide 11 ("The FCC should ensure that longstanding principles of network neutrality, which have been the hallmark of the narrowband world, carry forward into the broadband era.")

[42] Free Press Comments at 23-30.

[43] *Id*. at 23-25.

[44] AT&T Comments at 10.

[45] Comcast Comments at 11 (citations omitted).

Those who argue about private investment in broadband networks also overlook the public benefits that many broadband providers have enjoyed in constructing and maintaining their networks. As Google notes, "Today's last-mile broadband networks … have been shaped extensively by the government-bestowed franchises and related benefits that enabled incumbent telephone and cable companies to build out their networks to a large share of households and businesses."[46] These benefits include rights-of-way and pole access, exclusive franchises, and subsidies from universal service distribution and other government programs to construct and/or maintain network facilities that are used in the delivery of broadband services. Just as the National Telecommunications and Information Administration ("NTIA") and the Rural Utilities Service ("RUS") found it appropriate to impose basic nondiscrimination requirements on recipients of public funds from their broadband infrastructure stimulus programs, the Commission would be justified in ensuring a very basic level of public benefit from these "private" networks in light of the public contributions to them.[47] Similar measures certainly have not chilled interest in the broadband stimulus funding programs.[48] Thus, there is little basis for the claims that the proposed rules – particularly since they provide significant latitude for "reasonable network

[46] Google Comments at 22 (citing *Role of Competition in Broadband Policy* at 11; GERALD W. BROCK, THE TELECOMMUNICATIONS INDUSTRY: THE DYNAMICS OF MARKET STRUCTURE 155-156 (Harvard University Press 1981)).

[47] *See, e.g.*, Department of Agriculture, Rural Utilities Service, RIN 0572-ZA01, Broadband Initiatives Program, Department of Commerce, National Telecommunications and Information Administration, RIN 0660–ZA28, Broadband Technology Opportunities Program, Notice of Funds Availability (NOFA) and solicitation of applications, 74 Fed. Reg. 33104, 33132 (rel. July, 9, 2009).

[48] *See, e.g.*, "Commerce And Agriculture Announce Strong Demand For First Round Of Funding To Bring Broadband, Jobs To More Americans," NTIA and RUS Joint Press Release (dated Aug. 27, 2009) (available at: http://www.ntia.doc.gov/press/2009/BTOP_BIP_090827.html); Joan Engebretson, "Qwest 'actively pursuing' broadband stimulus, CEO says," Connected Planet (dated Feb. 18, 2010) (available at: http://connectedplanetonline.com/IP-NGN/news/Qwest-pursues-round-2-funds-0219/).

management" – would deter investment in broadband networks. To the contrary, straightforward but flexible rules such as those proposed here strike an appropriate balance in providing guidance to the industry and consumers and ensuring widespread enjoyment of public benefits from broadband Internet access, while also avoiding potential micromanagement of broadband networks through prescriptive requirements.[49]

II. THE COMMISSION HAS AMPLE AUTHORITY TO ADOPT THE PROPOSED RULES.

A. Adoption of the Proposed Rules Would Represent a Proper Exercise of Ancillary Authority.

Incumbent broadband Internet access providers and their allies are already asserting that the Commission has no authority whatsoever to adopt its proposed rules in the wake of the decision of the Court of Appeals for the District of Columbia Circuit in *Comcast v. FCC*.[50] But such arguments carry the court's decision too far. The court took pains to explain that it was *not* ruling that the Commission had no authority over Internet network management practices; to the contrary, it accepted the premise that the Commission has ancillary authority to impose "*some* kinds of obligations" over cable (and other) broadband Internet access services.[51] Rather, the

[49] Verizon's take on the reasonable balance struck by the proposed rules is particularly telling. Verizon suggests that prescriptive rules would be "particularly problematic in the context of an extremely dynamic environment," while at the same time asserting that "this is not a problem that can be remedied by the results of the case-by-case adjudication envisioned by the Commission." Verizon Comments at 52. In other words, Verizon apparently believes there can be *no* reasonable balance in adopting rules, and that even if a problem existed here, there is apparently no possible means by which the Commission could solve it.

[50] *See, e.g.*, Jim Cicconi, *AT&T on Comcast v. FCC Decision*, AT&T Public Policy Blog ("If, after assessing its options under Title I, the FCC feels it needs to clarify its jurisdiction as a result of today's decision, we hope the issue would be referred to the U.S. Congress which alone confers the Commission's legal authority.") (available at: http://attpublicpolicy.com/broadband-policy/att-statement-on-comcast-v-fcc-decision/)

[51] *Comcast v. FCC*, at 13-14 (emphasis in original); (quoting *Nat'l. Cable & Telecomm. Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 996 and 1002 (2005) ("the Commission remains free to impose special regulatory duties on [cable Internet providers] under its Title I ancillary jurisdiction," and "the Commission could likely 'require cable companies to allow independent ISPs access to their facilities' pursuant to its ancillary authority")).

court's ruling – like much of the debate in this docket – centered upon the statutory responsibilities to which the exercise of such authority might be "ancillary."[52] Indeed, even as the court rejected some of the Commission's arguments altogether, it declined to consider other arguments solely on procedural grounds in light of the Commission's failure to properly assert the bases for such an exercise of ancillary authority.[53]

Thus, the court's decision in *Comcast v. FCC* does not send the Commission back to the starting line. Instead, the Commission must simply take a step back and develop a careful and more robust justification for any exercise of ancillary authority over Internet network management practices. Specifically. nothing in *Comcast v. FCC* changes the fact that Section 2 of the Communications Act of 1934, as amended ("the Act"), vests the Commission with general jurisdiction over "interstate and foreign communication by wire or radio,"[54] in addition to its substantive statutory responsibilities under other provisions of the Act. The Commission is therefore empowered to exercise this ancillary authority if the proposed regulation addresses "interstate [or] foreign communication by wire or radio," and if the regulation is "reasonably ancillary to the effective performance of the Commission's various responsibilities [as delegated to it by Congress in the Act]."[55] The second prong is particularly important, having been the focus of the court's analysis in *Comcast v. FCC* and the focal point of debate in this proceeding as discussed further below. For the reasons explained below and in Vonage's initial comments,

---

[52] *Comcast v. FCC*, at 36.

[53] *Id*. at 33-34 (rejecting arguments referencing Title II and Title III as "statutory responsibilities" to which the exercise of authority might be ancillary because the Commission failed either to cite them in the *Comcast Order* or advance them in briefs on appeal).

[54] 47 U.S.C. § 152(a).

[55] *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 168, 178 (1968); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) ("*Midwest Video II*") (requiring that the Commission make "reference to the provisions of the Act" setting forth the responsibilities to which the proposed requirement is ancillary).

the Commission should find that adoption of the proposed rules would be well within in its ancillary authority under the Act.

1. The Proposed Rules Address Interstate Communications by Wire or Radio.

The services provided by broadband Internet access providers are unquestionably "interstate … communication by wire or radio" that fall within Congress' grant of authority to the Commission in Section 2. In each case, the broadband network operator undertakes to transmit on an interstate or international basis "writing, signs, signals, pictures, and sounds of all kinds" via the underlying medium, be it wire or radio.[56] There appears to be little, if any, serious debate regarding whether this first prong of the test is satisfied. Rather, consistent with the analysis of the court in *Comcast v. FCC*, the debate in this docket has swirled mainly around the second prong of the test – the question of to what other provision or Commission responsibility, if any, an exercise of authority here would be "ancillary."

2. The Proposed Rules are Ancillary to a Number of the Commission's Specific Statutory Responsibilities.

With respect to this second prong, the incumbent broadband Internet access providers and their allies raise two primary sets of arguments. First, they claim that there are no substantive statutory responsibilities to which the Commission can tether an exercise of ancillary authority, because the statutory sources cited by the Commission in the NPRM are either inapplicable or represent nothing more than "Congressional statements of purpose or policy."[57] Second, the opponents of the proposed rules assert that adoption of the proposed rules would contradict the

---

[56] *See* 47 U.S.C. § 151(33) and (51) (defining "radio communication" and "wire communication").

[57] *See, e.g.*, Comcast Comments at 25-26; Comments of Barbara S. Esbin, Progress and Freedom Foundation, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("PFF Comments"), at 19.

legislative regime.[58] As discussed below, however, such arguments extend the precedent too far, minimizing the importance of critical provisions in the Act and otherwise attempting to turn reasonable boundaries placed by the courts upon the exercise of ancillary authority into rigid walls that would bar Commission regulation of critical "communications by wire and radio."

A brief consideration of the precedent with respect to the doctrine of "ancillary authority" helps to show how these arguments miss the mark. As the Supreme Court has found, "[n]othing in the language of § 152(a) … limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions."[59] In *Southwestern Cable*, the Court faced the question of whether the Commission could regulate cable television systems without a specific and express legislative delegation of authority to do so. As these cable systems began to compete with broadcast stations that were clearly subject to its jurisdiction, the Commission had sought to regulate the carriage of broadcast signals by such systems. The Court upheld the Commission's exercise of authority, finding that cable systems clearly engaged in interstate "communication by wire or radio."[60] The Court also found that the fact that Congress had not responded to explicit requests for regulatory authority over cable systems did not reflect congressional intent to preclude regulation of such systems.[61] Finally, the Court determined that this exercise of authority was appropriate in light of the Commission's larger regulatory objectives with respect to broadcast television.[62]

---

[58] *See, e.g.,* Verizon Comments at 87-88; AT&T Comments at 209.

[59] *Southwestern Cable*, 392 U.S. at 172.

[60] *Id*. at 168-169.

[61] *Id*. at 169-171.

[62] *Id*. at 175.

Four years later, in *Midwest Video I*, the Supreme Court expanded upon its holding in *Southwestern Cable*. There again, the Commission sought to impose certain restrictions on the carriage of broadcast signals by cable systems. The Court found that, even though the cablecasts in question "may be transmitted without use of the broadcast spectrum" and thus would appear to fall outside the Commission's statutory authority over broadcast, the program-origination rule was a proper exercise of ancillary authority because it served "the broadcasting policies the Commission has specified."[63] In *Midwest Video II*, the Court invalidated the Commission's invocation of ancillary authority to impose yet another set of requirements on cable television systems. Specifically, the Court found that the "common carrier"-style regulations that the Commission sought to impose on cable systems could not be "reasonably ancillary" to the Commission's jurisdiction over broadcast television when it could not have applied such regulations to broadcasters themselves.[64]

Finally, the United States Court of Appeals for the District of Columbia Circuit has upheld an exercise of ancillary authority pursuant to Title I on a stand-alone basis. In *CCIA v. FCC*,[65] this court observed that it is "settled beyond peradventure that the Commission may assert jurisdiction under section 152(a) of the act over activities that are not within the reach of Title II."[66] Although such an exercise must of course be "reasonably ancillary to the effective performance of the Commission's various responsibilities," the court found that one of those responsibilities as charged by Section 2 of the Act "is to assure a nationwide system of wire communications services at reasonable prices."[67]

---

[63] *U.S. v. Midwest Video Corp.* 406 U.S. 649, 669 (1972) ("*Midwest Video I*").

[64] *Midwest Video II*, 440 U.S. at 702-703.

[65] 693 F.3d 198 (D.C. Cir. 1982).

[66] *Id*. at 213 (citation omitted).

[67] *Id*.

a. The Proposed Rules are Ancillary to Titles II and III of the Act.

The Commission has already identified several other substantive sources of authority to which an exercise of ancillary authority here would relate. Specifically, Titles II and III represent substantive grants of authority over the networks by which broadband services are delivered. In turn, these networks and the broadband Internet access services provided over them are increasingly becoming conduits for the delivery of voice and video services that compete with traditionally regulated telecommunications, cable, and broadcast services.[68]

(1) Title II

Although some contend that Title II cannot form the basis of any exercise of ancillary authority that would apply regulations to information service providers (because Title II applies only to common carriers),[69] the Commission has used its ancillary authority on numerous recent occasions to justify the application of Title II obligations on certain information service providers, even though those entities are not common carriers and do not provide telecommunications services.[70] Some also argue that specific provisions of Titles II and III cannot form the basis of

---

[68] *See* Google Comments at 44-46 (describing the significant impact of convergence as Internet-based video programming and VoIP services compete with traditional cable, broadcasting, and telephony services); *see also* Vonage Comments at 13 ("For example, a number of broadcasting companies collectively own Hulu.com which shows programs broadcast on the network television on the Internet, currently for no charge."); National Broadband Plan at §§ 3.1, 4.5, and 5.7, pp. 17, 59, and 97.

[69] *See, e.g.,* AT&T Comments at 219; Verizon Comments at 98.

[70] *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Dockets Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10261-62, 10264 (2005), at ¶¶ 28, 31 (imposing 911 emergency calling capability requirements on VoIP providers by reference to 47 U.S.C. §§ 151, 152(a), and 706); *Universal Service Contribution Methodology*, WC Docket No. 06-122; CC Dockets Nos. 96-45, 98-171, 90-571, 92-237; NSD File No. L-00-72; CC Dockets Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7542 (2006), at ¶ 47 (finding that §§ 151 and 254 "provide the requisite nexus" to impose universal service contribution requirements on VoIP providers); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order

any grant of ancillary authority because these provisions limit the exercise of authority to those acts necessary to carry out the provisions of their respective chapters.[71] Such arguments, however, are circular and would effectively preclude any exercise of ancillary authority where the underlying "substantive" provision does not expressly contemplate the exercise of such ancillary authority.

Nothing in the D.C. Circuit's *Comcast v. FCC* opinion undermines such an assertion of ancillary authority; rather, as even AT&T has acknowledged, the decision simply clarifies that any exercise of ancillary authority must be tethered to specific statutory responsibilities.[72] Indeed, the court declined to reach the merits of the Commission's Title II and III arguments, finding instead that the Commission's failure to present such arguments in its briefs and/or in the *Comcast Order* precluded consideration of these potential bases for ancillary authority.[73] Thus, the Commission can and should turn to a robust and thorough examination of those provisions (and other sections of the Act) in the wake of *Comcast v. FCC* so that these provisions may serve as firm statutory tethers for adoption of the proposed rules.

---

and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6955-56 (2007), at ¶ 55 (citing §§ 151, 222, and 706 for the proposition that the "requisite nexus" existed to extend CPNI rules to VoIP providers); *IP-Enabled Services*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275, 11276 (2007), at ¶ 1 (citing §§ 151, 225(b)(1), and 255 as the basis for extending disability access obligations to VoIP providers); *IP-Enabled Services*, WC Docket No. 04-36, Report and Order, 24 FCC Rcd 6039, 6044-47 (2009), at ¶¶ 9-13 (imposing Section 214 common carrier discontinuance requirements on VoIP providers pursuant to §§ 151, 214(a), and 706).

[71] AT&T Comments at 218-219; Verizon Comments at 98-99, 106.

[72] *Ex Parte* Letter from Gary L. Phillips, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Dockets Nos. 09-51 and 09-137, WC Dockets Nos. 05-337 and 03-109 (dated Apr. 12, 2010), at 2 ("Notably, however, while the court in *Comcast* held that statutory "statements of policy" … are, *standing alone*, an insufficient basis for the invocation of ancillary jurisdiction, … the court also recognized that when statutory policy statements are combined with other 'express delegations of authority,' the Commission may exercise ancillary jurisdiction over matters reasonably related to those policies and directives.")

[73] *Comcast v. FCC*, at 33-34.

For example, Section 201 could provide a substantive "statutory tether" for the exercise of ancillary authority over broadband Internet access network management practices. There are several reasons that Section 201 (and other provisions of Title II) can and should be considered as the basis for regulation of Internet network management practices. The National Broadband Plan highlights the increasingly interlocked and interdependent nature of the public switched telephone network (which is subject to Title II regulation) and broadband networks operated by many of the same providers:

> Increasingly, broadband is not a discrete, complementary communications service. Instead, it is a platform over which multiple IP-based services—including voice, data and video—converge. As this plan outlines, convergence in communications services and technologies creates extraordinary opportunities to improve American life and benefit consumers. *At the same time, convergence has a significant impact on the legacy Public Switched Telephone Network (PSTN)*, a system that has provided, and continues to provide, essential services to the American people.[74]

If broadband networks have a "significant impact" on those networks that remain subject to Title II regulation, one then cannot reasonably view the former in complete isolation from the latter. The Commission identified one such concern in the *Comcast Order*, observing that Comcast's blocking practices could cause shifts in traffic to – and thus foist increased costs upon – those Title II-regulated networks with whom Comcast's "unregulated" network competes.[75] The D.C. Circuit never reached the merits of this position, finding instead that the Commission did not advance it in defending the order upon appeal.[76] But in light of the massive record amassed to publish the National Broadband Plan and the clear indications that "convergence" is driving both competition and collaboration between the PSTN and broadband networks, Vonage

---

[74] National Broadband Plan, § 4.5, p. 59 (emphasis added and citations omitted).

[75] *Comcast Order*, 23 FCC Rcd at 13037-38, ¶ 17.

[76] *Comcast v. FCC*, at 33.

submits that the Commission has a substantial basis to exercise ancillary authority in connection with Section 201, and to ensure thereby that broadband network practices do not adversely affect the PSTN in terms of cost or traffic burden.[77] Those increased burdens could, over time, make it impossible for some common carriers to provide Title II-regulated communications services upon reasonable request at just and reasonable rates, and this potential impact is one that the Commission has an incontrovertible statutory responsibility to prevent.

Indeed, some of those who argue most strenuously against application of the network management rules have touted elsewhere the expanding relationship and increasing interdependency between advanced networks and the PSTN when it otherwise serves their purposes. NCTA has argued, for example:

> Within this market-based transition to IP networks, there is still an important role for continued targeted government involvement. In particular, federal and state regulators must ensure that the transition of legacy services to IP-based networks does not jeopardize the interconnection arrangements through which voice service providers are connected today. … NCTA previously has explained the best way to achieve this goal is for the Commission to make clear that Section 251 interconnection obligations continue to apply as carriers transition from circuit-switched networks to IP-based networks.[78]

AT&T has gone a step further, claiming in the National Broadband Plan proceeding that there is a need to "phaseout" the PSTN as an essential means of "achieving universal access to

[77] The Commission could also consider seeking additional comment (much as it already has in the National Broadband Plan proceeding) to establish other ways in which broadband networks and the PSTN are becoming increasingly intertwined. *See* Public Notice, *Comment Sought on Transition From Circuit-Switched Network to All-IP Network*, NBP Notice # 25, DA 09-2517 (rel. Dec. 1, 2009).

[78] Comments of NCTA (NBP Public Notice #25), GN Dockets Nos. 09-137, 09-51, and 09-47 (Dec. 22, 2009), at 4.

broadband."[79] It defies logic to argue on the one hand that a migration away from the PSTN is a necessary precursor to broadband deployment, while contending on the other hand that the PSTN and broadband networks have nothing to do with one another and that practices in managing broadband networks have no impact on the PSTN.

The Commission should also explore and affirmatively address other potential bases for exercising ancillary authority that is tied to Title II. For example, the Commission asserted in its brief to the D.C. Circuit in *Comcast v. FCC* that the potential for disruption to VoIP services that could follow from "network management" actions such as those undertaken by Comcast (and others before it) justifies an exercise of ancillary authority in connection with Title II. Specifically, the Commission observed that "VoIP can affect prices and practices (addressed by 47 U.S.C. §§ 201(b) and 205) as well as network interconnections and the ability of telephone subscribers to reach one another ubiquitously (addressed by 47 U.S.C. §§ 256)."[80] Such a determination would in fact be consistent with the findings in a series of prior orders that VoIP services have sufficient impact on the PSTN to justify the imposition of certain Title II obligations on them[81] – it logically follows that the broadband networks over which consumers make use of such VoIP services must also have a "significant impact" on the PSTN. Here too, the D.C. Circuit did not reject the Commission's attempt to exercise ancillary authority on the merits; instead, the court found that the Commission had failed to advance this as a basis for jurisdiction in the *Comcast Order* and therefore refused to examine this claim. The Commission can and should explore these potential bases for an exercise of ancillary authority over the management of wireline broadband networks in connection with Sections 201 and 205 of the Act.

---

[79] Comments of NCTA (NBP Public Notice #25), GN Dockets Nos. 09-137, 09-51, and 09-47 (Dec. 21, 2009), at 3-4, 8.

[80] Brief for Respondents, *Comcast Corp. v. FCC*, D.C. Cir., No. 08-1291, at 45.

[81] *See* footnote 78, *supra*.

(2) Title III

Beyond reaffirming the basic requirements associated with any exercise of ancillary authority, the *Comcast v. FCC* decision has no specific impact on the Commission's authority to adopt and enforce its proposed rules as ancillary to its Title III authority over both broadcasting matters and wireless signals. The court in *Comcast v. FCC* was presented only with the issue of whether the Commission had properly identified a "statutory responsibility" associated with its exercise of ancillary authority over cable-based broadband Internet access services. The D.C. Circuit concluded only that the *Comcast Order* did not reflect adequate discussion of how the regulation of broadband network management practices would implicate the Commission's ability to discharge its Title III broadcasting responsibilities.[82]

Thus, the court's decision should prompt the Commission to examine and develop a record with respect to how broadband network management practices – particularly on cable-based networks – affect the broadcast industry. Specifically, the Commission should seek evidence as how video programming accessed via broadband services is analogous to out-of-market cable programming, the effect of this program delivery on the broadcast market, and the potential harms that could arise if a cable provider were to block consumer access to such media.[83] For example, hearkening back to the "incentives" and "capabilities" factors that drive the need for the proposed rules in the first instance, the Commission might consider whether the proposed rules are necessary to preclude a cable-based broadband network operator from blocking online viewing of content from certain broadcasters in favor of an affiliated broadcasting division. If the Commission finds that such impacts exist, it could then presumably exercise ancillary authority over broadband network management practices in connection with the discharge of its statutory obligations with respect to broadcast matters under Title III.

---

[82] *Comcast v. FCC*, at 34.

[83] *See, e.g.*, Vonage Comments at 13.

Title III also confers substantial authority upon the FCC with respect to the spectrum used to provide mobile services. In fact, given the Commission's broad authority with respect to the licensing of such spectrum under Section 301,[84] it is not clear that the Commission need even reach the question of whether it has *ancillary* authority to impose network management regulations on wireless broadband Internet access services. Rather, Section 301 states that the purpose of the Act is "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority… ."[85] Section 303 further clarifies the Commission's role in this statutory objective, and establishes that the Commission *shall*

> as public convenience, interest, or necessity requires … [p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class; … [m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act; [s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; … [and] have the authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified … .[86]

The Commission determined in its *Internet Policy Statement* that reasonable boundaries on Internet access network management are necessary to ensure that the public interest (in the form of consumer expectations and demands) is satisfied through access to the applications, media, and content of each consumer's choosing.[87] The broad delegations of jurisdiction in

---

[84] 47 U.S.C. § 301.

[85] *Id*.

[86] *Id*. at §§ 303(b), (f), (g), and (l)(1).

[87] In fact, as the Commission noted in the *Internet Policy Statement*, Congress has made it an affirmative policy of the United States under Section 230 of the Act "to preserve the vibrant

Sections 301 and 303 over the licensing and use of radio spectrum should provide the Commission with ample *direct* authority to compel those who make use of such spectrum to adhere to network management requirements in doing so (for whatever purpose and without reference to whether it is a "telecommunications" or "information" service).[88] Alternatively, and at the very least, the Commission should find that it has ancillary authority aimed at ensuring that the Commission's Title III responsibilities with respect to the licensing of wireless spectrum and ensuring "more effective use" of that spectrum are not undermined through unreasonable or discriminatory practices adopted in the guise of "network management."[89]

b. The Proposed Rules are Ancillary to Section 706 of the Telecommunications Act of 1996.

Section 706 of the Telecommunications Act of 1996 further provides the Commission with a broad mandate to promote an open Internet and the availability of services required to access it. Although several commenters dismiss these provisions as deregulatory policy statements rather than substantive grants of authority,[90] these provisions of the Act provide sound footing for an exercise of ancillary authority. Section 706 provides that the FCC "*shall* encour-

---

and competitive free market that presently exists for the Internet" and "to promote the continued development of the Internet." *Internet Policy Statement*, at ¶ 2 (quoting 47 U.S.C. 230(b)(1) and (2)).

[88] *See* *National Ass'n. of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 636 (D.C. Cir. 1976) (finding that Section 303 imposes "a broad public convenience, interest, or necessity standard. In cases of such broad delegations to expert agencies, the standard of review is that of the reasonableness of the conclusions reached.") (citations omitted).

[89] Just as the National Broadband Plan concludes that "[t]he growth of wireless broadband will be constrained if government does not make spectrum available to enable network expansion and technology upgrades," *see* National Broadband Plan at § 5.1, p. 77, the "effective use" of existing spectrum would be undermined if network operators are able to favor certain content or applications over others without a reasonable basis for doing so.

[90] *See, e.g.*, Comments of the Center for Democracy & Technology, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("CDT Comments"), at 14-16; AT&T Comments at 215, 217; Verizon Comments at 99-110; PFF Comments at 46-52.

age the deployment on a reasonable and timely basis of advanced communications capability."[91] In both cases, Congress could not have been more clear in establishing regulatory goals for the Commission to pursue in connection with access to the Internet. In analyzing whether an exercise of ancillary authority is justified, the Supreme Court has indicated that the critical question is whether "the Commission has reasonably determined that its [regulatory action] will 'further the achievement of long-established regulatory goals."[92] Yet it would defeat the legislative objective of encouraging user control over what information they receive via Internet access if the Commission could not exercise ancillary authority to adopt rules that vest such control in users rather than operators. It would also defeat the purpose of the statute if the Commission had no power to carry out the mandate of Section 706 – that the Commission "shall' encourage deployment of advanced communications capability.[93] Congress could not have meant to give these objectives the force of law with the expectation that the Commission would then be powerless to carry them out.

The *Comcast v. FCC* decision does not foreclose reliance upon Section 706 as a "statutory responsibility" upon which an exercise of ancillary authority may rest. The D.C. Circuit's finding that Section 706 did not provide an adequate basis for adopting the *Comcast Order* was predicated upon a twelve-year-old statement by the Commission that this statute "does not constitute an independent grant of authority," and the Commission's failure to provide any

---

[91] 47 U.S.C. § 1302(a) (emphasis added).

[92] *Midwest Video I*, 406 U.S. at 667-68 (citations omitted).

[93] *See also Ad Hoc Telecomms. Users Committee v. FCC*, 573 F.3d 903, 906-907 (D.C. Cir. 2009) (finding that the "general and generous phrasing of § 706 means that the FCC possesses significant … *authority* and discretion to settle on the best regulatory or deregulatory approach to broadband").

explanation for departing from this view in the *Comcast Order*.[94] But the intervening years and the decision of the D.C. Circuit itself in *Ad Hoc Telecomms. Users Comm. v. FCC*[95] provide support for the proposition that Section 706 confers substantive authority upon the Commission to develop and enforce regulatory policies governing broadband networks.[96] Further, it is well-established that the Commission's hands are not tied by its past decisions, as long as it provides a rational explanation for changing course.[97] The Commission should therefore make an express and affirmative finding as to the substantive delegation of authority conferred by Section 706, thereby further supporting adoption of the proposed rules as a proper exercise of ancillary authority.

c. The Proposed Rules Do Not Contradict any Specific Legislative Regime.

Finally, in contrast to the regulatory measures at issue in *Midwest Video II*, the rules proposed here do not contradict any specific legislative regime. To the contrary, as discussed above, the proposed rules represent a narrowly tailored attempt to ensure that the Commission can fulfill its various statutory mandates with respect to services (such as VoIP or video distribution) that are provided or used in conjunction with broadband Internet access and yet compete with,

---

[94] *Comcast v. FCC*, at 30 (quoting *Deployment of Wirelines Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd 24012, 24047 (1998), at ¶ 77).

[95] 572 F.3d 903, 906-7 (D.C. Cir. 2009) ("The general and generous phrasing of § 706 means that the FCC possesses significant, albeit not unfettered, *authority and discretion* to settle on the best regulatory or deregulatory approach to broadband.") (emphasis added).

[96] Out of an abundance of caution and to ensure the development of a complete record, to the extent that such an interpretation of Section 706 may be viewed as a change in the reading of the statute in light of prior statements (*see Comcast v. FCC*, at 31), the Commission may want to issue a further notice of proposed rulemaking seeking comment on this interpretation and other legal bases for the exercise of jurisdiction in connection with the proposed rules.

[97] *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. ___, 129 S. Ct. 1800, 1811 (2009) ("[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.") (emphasis in original).

complement, or otherwise have a significant impact on services directly regulated under these substantive statutory provisions.[98] Moreover, network operators often use the same transmission facilities to provide broadband Internet access services and regulated services under Titles II and III, such that regulation of the manner in which such facilities are used would appear at a minimum "reasonably ancillary" to the Commission's responsibilities under those substantive grants of authority.[99] Indeed, the Supreme Court has confirmed that the Commission "has jurisdiction to impose additional obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications,"[100] and furthermore, that the Commission "remains free to impose special regulatory duties on facilities-based [Internet service providers] under its ancillary jurisdiction."[101] Adoption of the proposed rules would therefore represent an appropriate and lawful exercise of ancillary authority.

B. The Legal "Parade of Horribles" Raised by Opponents of the Rules is Without Merit.

1. Adopting the Proposed Rules Would be Neither Arbitrary Nor Capricious

AT&T asserts that it would be arbitrary and capricious for the Commission to adopt the rules as a "solution" to a "non-existent problem."[102] In particular, AT&T claims that the rules cannot be adopted on the basis of "two isolated and voluntarily-resolved incidents" or "on the pure speculation that Internet service providers *might* leverage in more of the same behavior as well as other conduct entirely unrelated to those two incidents."[103] Of course, this baseless claim

---

[98] *See* Brief for Respondents, *Comcast Corp. v. FCC*, D.C. Cir., No. 08-1291, at 43-45.

[99] CDT Comments, at 11, 20-22.

[100] *Brand X*, 545 U.S. at 976.

[101] *Id*. at 996.

[102] AT&T Comments at 227.

[103] *Id.* (citations omitted and emphasis in original).

proceeds from the general view held by AT&T and others that "there is nothing to see here" in these "isolated incidents," even as the record is clear that there is a much broader concern about the increasing incentives and capabilities of broadband Internet access service providers to discriminate.

Further, it ignores the fact that the FCC has historically undertaken a number of actions to protect the open Internet and the FCC's activities have undoubtedly help to ensure that broadband Internet access providers have generally not tried to prevent customers from accessing services, applications, or content of their choice or charging content, application, and service providers for access to their customers. Thus, the proposed rules are not some radical change in course, but an extension of the FCC's past actions to protect the open Internet – and are particularly appropriate given the questions surrounding the enforceability of the *Internet Policy Statement*.

In any event, AT&T is wrong in arguing that the cases it cites require a pervasive and sustained set of incidents or nefarious conduct to justify "prophylactic" rules. If that were the case, government could never regulate to prevent competitive harm that had not yet occurred, and malefactors would get not one, but several free bites at the apple before regulators could stop them from taking the fifth or sixth bite. Rather, as the United States Court of Appeals for the District of Columbia Circuit has noted, the key question is whether there is "a substantial enough *probability* of discrimination to deem reasonable a prophylactic rule."[104] In fact, the Commission has routinely adopted rules to prevent the occurrence of certain harms as a prophylactic measure. For example, in promulgating rules to protect children from overexposure to advertising, the Commission did not sit back and await a wave of complaints about such targeted advertising, finding instead that "it is better to take action to protect children from excessive commercializa-

[104] *Fox TV Stations v. FCC*, 280 F.3d 1027, 1051 (D.C. Cir. 2002) (emphasis supplied).

tion *before we are presented with evidence of abuses*."[105] Similarly, and of particular relevance to the present circumstances, where the Commission has found a potential for abusive practices within an industry, it has implemented rules to limit[106] and prevent such potential opportunistic behavior.[107]

By contrast, the case upon which AT&T primarily relies for its arguments, *National Fuel Gas Supply Corp. v. FERC*,[108] provides no basis to conclude that adoption of the proposed rules would be arbitrary or capricious. In that case, FERC specifically relied on a supposed record of abuse to justify its rule, *but then failed to produce any evidence of such abuse*.[109] In contrast, the fundamental concern here is that the "isolated incidents" are but the tip of a larger iceberg, namely that network operators may be increasingly interested in and more capable of imposing

---

[105] *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992* (Second Recon. Order) *Direct Broadcast Satellite Public Interest Obligations Sua Sponte Reconsideration*, Second Order on Reconsideration of First Report and Order, 19 FCC Rcd 5647, 5666 (2004), at ¶ 44 (emphasis added); *see also id.* at 5666-67, ¶ 44 ("Although Section 335(a) does not require commercialization guidelines for children's programming on DBS, such guidelines are consistent with our public interest programming authority in this section. Accordingly, we conclude that prophylactic rules should be adopted that will protect children while imposing minimal burdens on DBS providers.").

[106] See, e.g., *GTE Corp., Transferor and, Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14082 (2000), at ¶ 89 ("[R]eflecting our view that relationships that offer potential for significant influence or control should be counted in applying the broadcast and cable ownership rules, which promote diversity and competition, we adopted a targeted prophylactic, structural rule under which we would make certain interests attributable using a bright line test.") (internal citations omitted).

[107] *See, e.g., BPS Telephone Co. Petition for Waiver of Section 69.605(c) of the Commission's Rules*, 12 FCC Rcd 13829 (AAD 1997), at ¶ 15. ("We have long recognized the incentives to 'game' the system to the detriment of interstate ratepayers, and we have consistently stated that the purpose behind section 69.605(c) was to prevent this sort of opportunistic behavior.") (internal citations omitted).

[108] 468 F.3d 831 (D.C. Cir. 2006).

[109] *Id*. at 844.

discriminatory limits or erecting outright barriers to access to certain content, applications, and services.[110] AT&T's citation to *Associated Gas Distributors v. FERC* is likewise inapposite.[111] The D.C. Circuit clarified *Associated Gas Distributors* in a subsequent ruling, holding that a problem need not "be widespread to permit a generic solution."[112] Instead, the D.C. Circuit explained that "the very quotation from [*Associated Gas Distributors*] on which [the petitioner] relies shows that *proportionality* between the identified problem and the remedy is the key."[113]

Indeed, this is the point to which AT&T itself quickly retreats in its comments. After asserting that adoption of the proposed rules would be arbitrary and capricious because they reflect a response to "isolated incidents," AT&T falls back almost immediately to the argument that the real problem is that the rules are (in its view) "particularly disproportionate."[114] Put another way, the crux of the argument is not about whether the FCC can adopt prophylactic rules, but whether the rules are appropriately tailored to the problem presented. The record is clear that the proposed rules are well-tailored for the problem at hand; if anything, the rules should be strengthened as discussed herein and in Vonage's initial comments to address specific concerns that might not be addressed by the proposal in its current form. But AT&T certainly provides no convincing argument that a more "proportionate" response would be to do nothing at all because "the *existing* principles of the *Internet Policy Statement* fully address" concerns about blocking or degradation of applications.[115] In fact, this recommendation by AT&T to let the "existing

[110] NPRM, at ¶¶ 50-80

[111] AT&T Comments at n.499 (citing *Associated Gas Distributors v. FERC,* 824 F.3d 981, 1019 (D.C. Cir. 1987)).

[112] *Interstate Natural Gas Association of America v. FERC*, 285 F.3d 18, 31 (D.C. Cir. 2002).

[113] *Id*. (emphasis in original).

[114] AT&T Comments at 228.

[115] *Id*. at 229 (emphasis in original).

principles" take care of things contradicts its argument only a few pages earlier that these same principles are unenforceable as a matter of law.[116] Thus, adoption of the proposed rules would not represent an arbitrary or capricious effort to regulate as a kneejerk reaction to a few "isolated incidents." Instead, adoption of these rules would represent a thoughtful and proportionate response to the concerns identified throughout the record of this proceeding and in numerous other proceedings before the Commission over the past decade.

2. The Proposed Rules Safeguard First Amendment Rights.

The constitutional objections to the proposed rules raised by various network operators simply ignore certain fundamental First Amendment principles. In *Associated Press v. United States*,[117] for example, the Supreme Court held that the First Amendment does not prohibit the government from enforcing content-neutral laws that limit the freedom of the press to refuse to deal with competitors. The antitrust laws at issue in *Associated Press*, like the proposed rules, had the effect of promoting the free flow of information. To paraphrase the Supreme Court:

> It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of [neutrality principles], here provides powerful reasons to the contrary. *That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public*, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford [network operators] a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. … *Freedom of the press from governmental*

[116] *Id*. at 217 ("[T]he courts have made clear that the Commission does not have ancillary authority to enforce mere policy.")

[117] 326 U.S. 1 (1945),

> *interference under the First Amendment does not sanction repression of that freedom by private interests*.[118]

There is, of course, nothing unique about the antitrust laws that make them invulnerable to First Amendment scrutiny. Rather, the lesson of *Associated Press* is that the federal government has ample authority to enforce content neutral laws that promote core First Amendment interests, the very purpose of the proposed rules.

The network operators also fail to acknowledge that the proposed rules affect only the transmission aspects of their businesses without infringing upon or impairing in any way the exercise of any constitutionally protected communicative act. Just as a publisher has no "peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices" simply because he "handles news while others handle food," *id.* at 7, so too, the act of combining different business operations – whether it be food and news or transmission and content – does not immunize the non-speech operations of the network operators from the proposed rules. Yet that is the essence of the constitutional objections raised by the network operators: that their foray into content delivery exempts the rest of their business operations from lawful regulations that, in fact, promote the free flow of information.

Straining to find a constitutional hook on which to base their objections, the network operators assert that the proposed rules would violate their First Amendment rights by requiring them to endorse the messages of third parties with whom they might disagree. This argument stretches the First Amendment's protections against compelled speech beyond the breaking point. In *PruneYard Shopping Center v. Robins,*[119] the Supreme Court rejected a private property owner's claim of a "First Amendment right not to be forced by the State to use his property as a

---

[118] *Id*. at 20 (emphasis added).

[119] 447 U.S. 74 (1980),

forum for the speech of others."[120] *PruneYard* involved a challenge to a state law that required the owner of a private shopping center to allow persons to enter on its property to deliver political messages. As here, the owner claimed the right to control the way in which its private property could be used by others as a means of communication. And, as here, the owner claimed that enforcing the law would compel the owner to effectively endorse messages with which it disagreed. In reasoning fully applicable here, the Supreme Court rejected each of those arguments.

> Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.[121]

If, as *PruneYard* held, the owner of a private shopping center is not likely to be associated with the views of speakers who deliver controversial political messages on the owner's property, then surely there is no serious argument that consumers are likely to associate Internet content with their ISP or with the infrastructure over which the Internet service runs. "The danger that a customer will, for instance, assume that the cable operator endorses a neo-Nazi site that she reaches through the cable Internet service is specious, especially if it is common knowledge that the cable company operates under an open access regime. Additionally, a consumer would be much more likely to associate offensive television programming with the cable opera-

[120] *Id.* at 85.

[121] *Id*. at 87.

tor than Internet content because, apart from must carry and certain other obligations, consumers know that cable operators do maintain the right to actively select the television channels they carry. Cable ISPs, on the other hand, serve in large part as mere conduits for content produced by other, and often rival, content producers."[122]

In sum, because the proposed rules regulate transmission activities, not speech activities, and do not require network operators to endorse messages of any kind, there is no meritorious First Amendment objection to their adoption.

3. The Proposed Rules Satisfy First Amendment Scrutiny

When reviewing the constitutionality of must-carry provisions governing cable television systems, the Supreme Court has applied an intermediate level of First Amendment scrutiny.[123] In cases such as this one, however, involving the application of neutrality principles to network providers, even an intermediate level of scrutiny is too stringent. The *Turner I* Court was faced with a zero sum game: because of the scarcity of cable channels, cable operators required to carry certain channels were forced to forgo other programming choices.[124] There is no similar scarcity with respect to the provision of Internet services and access. Nor does providing a

[122] *Open Access and the First Amendment: A Critique of Comcast Cablevision of Broward County, Inc. v. Broward County*, 4 Yale Symp. On L. & Tech. 6, 33 (2001). *See generally Leathers v. Medlock*, 499 U.S. 439 (1991) (content neutral tax on cable companies that did not apply to other media did not violate the First Amendment). The network operators' reliance on *Miami Herald, Inc. v. Tornillo*, 418 U.S. 241 (1974) is misplaced. Unlike the Proposed Rules, the law at issue in *Tornillo* was content-based and the government dictated the message that a newspaper was obligated to convey: under the statute, attacks on political candidates triggered a right to reply on the part of the candidate. *Id.* at 244, 256-58. The Court expressly contrasted situations in which one acts as a "passive receptacle or conduit for news, comment, and advertising," precisely the situation presented when the network providers perform their transmission operations. *Id.* at 258.

[123] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("*Turner I*").

[124] *Id.* at 636-37.

passive transmission service to third parties amount to an expressive act protected by the First Amendment. In the words of one commentator, "the medium is not the message."[125]

Even assuming, however, that the proposed rules actually would restrict First Amendment rights, they easily pass First Amendment scrutiny. As a threshold matter, any suggestion that the proposed rules must satisfy a strict scrutiny analysis is meritless. The First Amendment requires strict scrutiny of content-based speech regulations.[126] The proposed rules, in contrast, are triggered by a network provider offering internet access service, not by the desired message of any application or content providers. Such regulations are by definition content-neutral, not content-based. *See id.* (the "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys") (quotations and citation omitted). As the *Turner I* Court stated in rejecting the contention that the must-carry rules for cable television operators required strict scrutiny: "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[127] Accordingly, strict scrutiny does not apply.

Accordingly, under *Turner I*, the most stringent standard that the proposed rules must meet is intermediate scrutiny. Intermediate scrutiny requires that the government regulation at issue (1) promote an important governmental interest unrelated to the suppression of speech and

---

[125] H. Feld, *Whose Line Is It Anyway? The First Amendment and Cable Open Access*, 8 Comm. Law Conspectus 23, 29 (2000) ("Feld") (capitalizations altered).

[126] *See generally Turner I*, 512 U.S. at 642.

[127] *Id*. at 656.

(2) not burden speech any more than is essential.[128] The proposed rules undoubtedly meet that test.

As has been explained in detail in other sections of this submission, network neutrality provides citizens with access to information and a forum in which they can be heard. It must be preserved if the Internet is to continue as a forum for diverse discourse and educational and intellectual activities. Under these circumstances, to say that the proposed rules promote an important governmental interest unrelated to the suppression of speech therefore is in fact an understatement.

Nor do the proposed rules burden speech any more than is essential to accomplish their content-neutral purpose. Nothing in the proposed rules interferes with the "'repertoire of services' that the [network] operator wishes to offer, the subscriber will still receive the full range and mix of speech that the [network] operator – in the exercise of its editorial discretion – wish[es] to communicate. What the [network] operator loses is simply the ability to deny access to other's speech."[129] In short, in view of the important governmental purposes furthered by the proposed rules and the minimal (if any) burden imposed on speech, the proposed rules satisfy the First Amendment.

4. The Proposed Rules Would Not Result in a Taking of Property

The claim that adoption of net neutrality rules would result in a regulatory taking by forcing Internet access providers to permit content providers "free access" to their facilities, as argued by AT&T and Verizon among others, is farcical. This argument is based on a complete misrepresentation of how the Internet works. As noted earlier, any transmission over the Internet has two ends – a packet is sent from one host, and received at another. Information does not just

[128] *Id*. at 662 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[129] Feld, *supra*, 8 Comm. Law Conspectus at 41.

magically appear on the Internet; the content provider has to pay to make it available (either by paying a service provider such as a Web hosting service, or by purchasing and deploying its own equipment to perform the equivalent functions). And packets do not just magically appear on Verizon's or AT&T's network: either they are originated by one of that company's subscribers who is paying for Internet access, or they are received from another network with which Verizon or AT&T has an interconnection arrangement, which presumably includes either payment or some other form of offsetting compensation to Verizon or AT&T for accepting and delivering the packets.

The "takings" argument therefore asserts that the Commission's proposed rules would somehow require a network operator to accept packets from other networks without any previous interconnection arrangement with that other network. The Commission can quite easily dispense with this concern by clarifying that "reasonable network management" includes actions to prevent unauthorized use of or access to a network.

III. THE PROPOSED RULES SHOULD APPLY WITH EQUAL FORCE TO ALL BROADBAND INTERNET ACCESS SERVICES.

A. The Proposed Rules Account for Differences in Network Technologies.

The touchstone of any decision in this docket must be consumer expectation – what would a consumer expect in attempting to access an application or content over the Internet from any given device? The answer on the record is clear: the consumer expects to be able to view and use the applications or content he or she is seeking, and does not anticipate that his or her broadband service provider will limit or preclude access altogether because the device happens to be wireless. Indeed, "the public communications network is now a unified interconnected network,"[130] and "consumers increasingly expect similar Internet experiences across all broadband

[130] Comments of the National Association of State Utility Consumer Advocates, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("NASUCA Comments"), at 24.

connections."[131] Further, the providers themselves are helping to set these consumer expectations regarding wireless broadband Internet service. As Vonage explained in its initial comments, advertising for the Motorola Droid smartphone provides one such example, promising the ability to surf the Internet with the "speed and power of a pro surfer at pipeline" and promoting an online experience in which the consumer can view videos as if on a landline connection.[132] Given consumer expectations and the converging experience for wired and wireless broadband Internet service, the Commission should apply its proposed rules to wireless broadband Internet service.[133]

Moreover, applying the proposed rules equally to all broadband Internet access services would serve the objective of establishing "a consistent regulatory framework across broadband platforms by regulating like services in a similar manner."[134] Communications regulatory policy should be technology neutral. The Commission has classified wireless broadband services as Title I "information services,"[135] just like DSL,[136] cable modem,[137] and broadband over power

---

[131] Comments of Skype Communications S.A.R.L., GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("Skype Comments"), at 5; *see also* Google Comments at 77-78; Comments of the Open Internet Coalition, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("Open Internet Comments"), at 36-37; National Broadband Plan at § 5.1, p. 77 ("These new devices drive higher data usage per subscriber, as users engage with data-intensive social networking applications and user-generated video content.")

[132] Vonage Comments at 29. There are similar advertisements. *See, e.g.*, Sprint MiFi advertisement, available at http://www.youtube.com/watch?v=AVTO-2Qrt7U (shows co-workers riding in a car and using a range of Internet content from work to entertainment), T-Mobile G-1 advertisement, available at http://www.youtube.com/watch?v=0ZHgZr3SXCA (showing the device performing a range of functions on the Internet).

[133] *See* National Broadband Plan at § 3.1, p. 17 ("Video, television (TV) and broadband are converging in the home and on mobile handsets.")

[134] Skype Comments at 5 (citing *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, WT Docket No. 07-53, FCC 07-30 ("Wireless Broadband Services Order"), at 2, ¶ 2 (rel. Mar. 23, 2007)); see also Open Internet Comments at 36-37; Google Comments at 77.

[135] *Wireless Broadband Services Order*, at 2, ¶ 2 (rel. Mar. 23, 2007).

line.[138] By affirming that the proposed principles apply to all networks, including wireless networks, the Commission would further this important policy of technological neutrality.

Opponents of the application of the proposed rules to wireless service do not offer any convincing rationale for their position in the initial comments. Much as they argue that the proposed rules are unnecessary as a general matter because the "market" will address any concerns, opponents of applying the proposed rules specifically to wireless services and devices tout "competition" as a primary reason to refrain from doing so.[139] But just as the "market"-based arguments against general adoption of the proposed rules fall short for the reasons explained in Section I.C., *supra*, so too is there little basis to believe that competition in the wireless market will provide a meaningful deterrent to favoring certain content or applications.

As an initial matter, the wireless market has been subject to striking consolidation, leaving a handful of operators in charge of the wireless networks through which most Americans

---

[136] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review - Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 USC §160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Consumer Protection in the Broadband Era, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005).

[137] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

[138] *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006).

[139] *See* Verizon Comments at 59-60 ("[T]he wireless marketplace has been moving toward greater openness – driven not by regulation, but market forces and customer demands."); AT&T Comments at 143 ("… [W]ireless carriers now actively promote the very features, services, and applications that regulation advocates claimed were endangered.")

receive service.[140] Moreover, the barriers to facilities-based entry into the wireless market are quite high, ranging from the need to acquire sufficient spectrum[141] to the many requirements associated with deploying infrastructure.[142] The National Broadband Plan lays plain the impact of such consolidation and the barriers to entry on the purportedly "competitive" mobile broadband market: as of November 2009, "approximately 77% of the U.S. population lived in an area served by three or more 3G service providers, 12% lived in an area served by two, and 9% lived in an area served by one. About 2% lived in an area with no provider."[143] And just as with the assessment of competition in the wireline market, the plan cautions that "[t]hese measures likely overstate the coverage actually experienced by consumers, since American Roamer reports *advertised* coverage as reported by many carriers who all use different definitions of coverage."[144] In fact, the Commission found in 2006 that only 4 "nationwide" mobile telephone operators served nearly 87% of American subscribers – with AT&T and Verizon alone serving more than half of all Americans as of that date. With Verizon's subsequent purchase of Alltel (then the 5th largest operator) and AT&T's purchase of most of the assets that Verizon divested

[140] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 07-71, Twelfth Report, 23 FCC Rcd 2241, 2254-2256 (2008) ("CMRS Market Report"), at ¶¶ 18-19.

[141] *See Fostering Innovation and Investment in the Wireless Communications Market*, GN Docket No. 09-157, *A National Broadband Plan for our Future*, GN Docket No. 09-51, Notice of Inquiry, 24 FCC Rcd 11322, 11327 (2009), at ¶25 ("One of the most complex challenges for promoting innovation in the wireless sector is making sufficient spectrum available – both in terms of frequency bands and amount of bandwidth – to support new services and new applications.")

[142] *Id*. at 11337-11340, ¶¶ 49-53.

[143] National Broadband Plan at § 4.1, p. 39 (citations omitted).

[144] *Id*. (emphasis in original).

in that acquisition, these 2006 estimates likely understate the degree to which American subscribers rely on one of these two companies today for wireless access.[145]

Thus, there is little threat to the existing duopoly/oligopoly, and the remnants of true "competition" that exist today have failed to deter wireless carriers from efforts to discriminate against certain applications and content or from injecting onerous and potentially anticompetitive terms into their retail service contracts.[146] Further, as Skype explains, even facilities-based competition may not address discrimination where providers have a shared interest and equal ability to exclude rival content, applications, or portals.[147] Indeed, competition between network providers could ironically promote *less* transparency into how wireless networks are managed, as operators limit their disclosures for competitive reasons.[148] Finally, while there may be "churn" within wireless subscribership, industry practices often result in annual or multiple-year commitments and the imposition of sizeable early termination fees[149] – meaning that there is likely little "threat" that a customer would be able to make an immediate departure from a wireless provider's service over concerns with that provider's "network management" techniques.

---

[145] CMRS Market Report, 23 FCC Rcd at 2254-2256, ¶¶ 18-19; *see also Sky Terra Communications, Inc., Transferor, and Harbinger Capital Partners Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, IB Docket No. 08-184, FCC File Nos. ITC-T/C-20080822-00397, *et al.*, Memorandum Opinion and Order and Declaratory Ruling (rel. Mar. 26, 2010), at ¶¶ 68-73 (imposing a series of conditions on transactions between the applicants and "the two largest terrestrial providers of CMRS and broadband services" in the interest of realizing benefits from "added competition" from a 4G network).

[146] *See* Google Comments at 79-80.

[147] Skype Comments at 10-11 (citing Schewick, Towards an Economic Framework for Network Neutrality Regulation, *supra* note 3, at 370).

[148] *See* T-Mobile Comments at 38 (arguing that disclosure of certain information regarding how an operator manages its network "would introduce real risks" and "could assist those interested in undermining T-Mobile's network management measures").

[149] *See* Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau, FCC, to Steven E. Zipperstein, Vice President - Legal and External Affairs, General Counsel and Secretary, Verizon Wireless, DA 09-2535 (dated Dec. 4, 2009) (seeking information on increases in early termination fees and charges for use of mobile web services).

Incumbent wireless providers also claim that consumer expectations and the objective of technological neutrality must be subordinated to the technical requirements associated with operating a wireless network. AT&T calls the proposal to extend these rules to wireless networks "the least supportable and most potentially damaging aspect of the NPRM,"[150] asserting that "spectrum constraints, a shared 'last mile' radio access network, interference sensitivity, and other concerns … make it far more challenging to provide wireless broadband than wireline service."[151] CTIA similarly argues that "[r]eliance on spectrum, the recognition that wireless customers are mobile, and significant interaction between customer equipment and the network make wireless completely different from a technology perspective."[152]

These arguments present a false "either/or" choice for the Commission. Claims that "wireless is special" more often than not reflect a desire to protect a business model through overly broad and anticompetitive restrictions rather than a *bona fide* effort to "prevent harm" to any network.[153] Moreover, such arguments give short shrift to – or ignore altogether – the flexibility of the Commission's proposed carve-out for "reasonable network management." For example, while CTIA acknowledges that "the NPRM recognizes that wireless networks are different," it goes too far in claiming that "the rules themselves fail to create any distinction between wireless and wired networks in practical application."[154] To the contrary, the definition

---

[150] AT&T Comments at 140-41.

[151] *Id*. at 156 (citing NPRM at ¶¶ 157, 159).

[152] Comments of CTIA - The Wireless Association, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010) ("CTIA Comments"), at 38.

[153] *See* Vonage Comments at 31 (citing Letter to Acting Chairman Michael J. Copps, FCC, from Ben Scott, Policy Director and Chris Riley, Policy Counsel, Free Press, WC Docket No. 07-52, 2 (Apr. 3, 2009) (requesting FCC investigation into wireless carrier practices, including those undertaken with respect to Skype's mobile application)).

[154] CTIA Comments at 3.

of reasonable network management contained in the NPRM affords just the kind of flexibility needed for "practical application"; under the Commission's proposal, reasonable network management "consists of: (a) reasonable practices employed by a provider of broadband Internet access service to (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns; (ii) address traffic that is unwanted by users or harmful; (iii) prevent the transfer of unlawful content; or (iv) prevent the unlawful transfer of content; and (b) other reasonable network management practices."[155] With "reasonable network management" as an exception to application of the proposed rules, network operators will enjoy substantial latitude to "mitigate the effects of congestion" or "prevent the transfer of unlawful content."

Like Skype, Vonage agrees that "technical characteristics of wireless networks could justify network management practices that differ from those used by wireline broadband services," and that "the [NPRM] appropriately takes into account such differences."[156] For example, if the potential for congestion in a shared, spectrum-dependent wireless environment calls for a different network management technique than would apply in a "last mile" wireline context,[157] nothing

[155] NPRM, at ¶ 135.

[156] Skype Comments at 5-6.

[157] *See, e.g.*, AT&T Comments at 157-58 (describing capacity and quality-of-service challenges that may arise in spectrum that is shared by both users and cell sites). AT&T further claims that a "reasonable network management" provision will not allow network operators to keep pace with the rapidly evolving nature of wireless technology issues and the applications and content that run across such networks. *See id*. at 168-72. But the "worst case" examples given by AT&T all appear to arise out of issues that fall squarely within the "reasonable network management" categories proposed by the Commission, such as such as congestion and harmful traffic. Moreover, Vonage supports the joint recommendations of Google and Verizon that the Commission convene technical advisory groups to help develop best practices and navigate concerns such as those presented by AT&T. Letter from Alan Davidson, Director of Public Policy, Americas, Google, and Thomas J. Tauke, Executive Vice President, Public Affairs, Policy & Communications, Verizon, to Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010), at 5-6.

in the rule would preclude a wireless network operator from taking reasonable steps to address such concerns. In fact, there appears to be little argument that "[a]ll broadband networks are not identical," and that "[r]easonable network management should be more flexible for wireless broadband providers."[158] By taking adequate account of the differences between networks, the Commission's proposed definition of "reasonable network management" thus helps ensure that wireless network operates can respond to the unique challenges presented by their technical environments, while also ensuring that such operators are precluded from unilaterally imposing their respective views of what constitutes an "open" Internet experience.

But while "reasonable network management" should be read flexibly, it must not become so broad as to allow any "exception to swallow the rule." For example, Vonage concurs with Google that congestion should never provide a *permanent* or even *long-term* justification for an exercise of "network management" on *any* kind of network – wireless or wireline.[159] If traffic levels consistently result in congestion on a network, the solution is to add capacity or identify other engineering solutions rather than ratchet traffic or deny certain kinds of access. Likewise, "reasonable network management" should be applied surgically to network congestion[160] – absent an indication of some kind of "attack" or pervasive unlawful activity, there is no need to effect a change throughout the network to address congestion arising in only one part of the network.

Finally, in considering to what degree "reasonable network management" should permit providers "to address quality-of-service concerns,"[161] the Commission should hearken back to

---

[158] *See* Google Comments at 81.

[159] *Id*. at 69.

[160] *Id*.

[161] NPRM, at ¶ 135.

the touchstone of this proceeding – the expectation of consumers. It is important to maintain flexibility with respect to reasonable network management as designed to address quality of service concerns, especially for those services and applications that provide two-way, real time communications that are disproportionately affected by transmission jitter, latency, packet loss, and other delays. Even some of the most stringent net neutrality proponents have noted that open access conditions "can help maintain the Internet's greatest deviation from network neutrality. That deviation is favoritism of data applications, as a class, over latency-sensitive applications involving voice or video."[162] To counteract this bias, the Commission should make it clear that prioritizing packets more sensitive to transmission delays over packets that are not sensitive to such delays (such as e-mail, non-interactive one-way video, FTP and other file transfer applications, and other similar services) can qualify as reasonable network management, as it could improve service quality and satisfy consumer expectations. Adopting a logical order of packet priority that gives greatest priority to real-time, two-way, delay sensitive applications (*e.g.*, video conferencing, VoIP, and on-line gaming, IPTV, emergency services) and lesser priority to applications that are not as sensitive to delay (*e.g.*, peer-to-peer traffic, one-way video, email, and other data transfer protocols) can allow delay sensitive applications to run more efficiently during times of network congestion without significantly impacting less delay sensitive applica-

[162] *See* Tim Wu, *Network Neutrality, Broadband Discrimination*, Journal of Telecommunications and High Technology Law, at 141 (Vol. 2. 2003). Skype argues that the answer for quality-of-service concerns is to permit consumers to elect their own priorities. Skype Comments at 18-19. But even if this appears at first glance to "put the customer in control," the proposal would only frustrate consumer expectations in the end – an end-to-end communication requires the use of network extending far beyond the last-mile connections or edge devices over which the consumer might have any control, meaning that an individual customer's prioritization will do little, if anything, to ensure that latency does not affect a particular application as traffic traverses the wider network. To the contrary, a customer's expectation would be *defeated* if he or she experiences delay on an interaction that he or she thought had been set for the highest priority.

tions.[163] Thus, the fact that the Commission has defined "reasonable network management" to include the concept of addressing quality-of-service issues should assuage the concerns of those who express fear about the rules' impact on latency-sensitive applications,[164] and the Commission should confirm that such efforts would indeed fall within the scope of "reasonable network management."[165]

B. The Commission Should Reject the "Red Herring" Suggestion to Extend the Nondiscrimination Rule to Application and Content Providers.

The Commission should not take the bait on the baseless recommendation by AT&T and Comcast to extend any rules adopted here to content, application, and service providers.[166] Such suggestions are obviously motivated by a desire to "muddy the waters" surrounding adoption of the proposed rules or to use such rules as a weapon in collateral regulatory battles on issues such as intercarrier compensation,[167] rather than by a concern over any real risk that content, application, or service providers could exercise bottleneck control over essential facilities or exercise the power associated with terminating access monopolies.[168] There has been no serious allegation

---

[163] *See* George Ou, Managing Broadband Networks: A Policymaker's Guide, The Information Technology and Innovation Foundation, at 23, *available at*: http://www.itif.org/index.php?id=205.

[164] *See, e.g.*, Verizon Comments at 67.

[165] To address concerns about the potential for this "exception" to overwhelm the rule, the Commission could also require as part of the transparency rule that broadband network operators disclose any quality-of-service practices, such as the prioritization of latency-sensitive applications. *See* Vonage Comments at 25-26.

[166] *See* NPRM, at n. 222 (citing Letter from Robert W. Quinn, Jr., Senior Vice President Federal Regulatory, AT&T Services, Inc., to Sharon Gillett, Chief, Wireline Competition Bureau, WC Docket Nos. 07-135, 07-52 ("*AT&T Letter*"), at 2-3 (filed Sept. 25, 2009)); Comcast at 35-36.

[167] AT&T Letter at 4 (concluding its arguments about Google Voice by urging the Commission to "end, once and for all, the patently unlawful 'traffic pumping' schemes that drive carriers to block calls in the first place").

[168] *See* Skype Comments at 20-21.

(and there could be none) that content, application, or service providers play any significant gate-keeping or exclusionary role; to the contrary, such providers represent the "destinations" rather than the "toll roads," rendering the information, performing the act, or delivering the service *as sought by the customer*.[169]

A host of legal and regulatory concerns would also arise in any attempt to extend the proposed rules to content, application, or service providers. As an initial matter, whereas the Commission clearly has substantive authority pursuant to Titles II and III over the communications networks by which broadband services are delivered as discussed in Section II above, there is no substantive statutory grant (and thus no basis for ancillary authority) pursuant to which the Commission could apply the proposed rules to Internet applications, services, or content.[170] Moreover, regulating "nondiscrimination" in the context of content would give rise to thorny First Amendment concerns – for example, the Commission could be called upon to consider whether the rendering of certain content was "nondiscriminatory," or whether other information should have instead (or also) been rendered to provide more "balanced" content. Thus, there is no basis in law or fact and no reasonable policy basis for the throwaway argument that the proposed rules should be extended to content, application, or service providers.

---

[169] Comcast's reference to Google's advertising placement model as a reason for concern is laughable. Comcast Comments at 35. Google's search engine returns information as sought by the user, and then separately posts (under a heading entitled "Sponsored Links") certain information based upon advertiser payments. Moreover, if any customer were displeased with the relevance of results from Google's search engine, there are any number of other competitors to whom the customer can easily, quickly, and *freely* move (as compared to the substantial barriers to migration between broadband service providers). Any arguments that such advertising placement practices somehow defy consumer expectations or represent bottleneck control warranting the imposition of a nondiscrimination rule are therefore disingenuous, at best.

[170] *See* Google Comments at 85 and n. 258 (citations omitted).

IV. PERMITTING THE IMPOSITION OF "ACCESS CHARGES" WOULD UNDERMINE THE NEW RULES AND THREATEN THE OPEN INTERNET.

The NPRM states that "[w]e understand the term 'nondiscriminatory' to mean that a broadband Internet access service provider may not charge a content, application, or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider…."[171] As Vonage explained in its initial comments, although this definition may address many fundamental concerns associated with potential discrimination by network operators, it fails to deal directly with all circumstances where a broadband service provider imposes charges for access to subscribers on a broadband provider's network. Specifically, Vonage is concerned that this concept is too narrow in focusing only on *prioritized or preferential* access. For example, a network operator could impose charges on all application and content providers for ***any*** access to its subscribers – not just prioritized access. Given that the National Broadband Plan just proposed to eliminate per minute access charges in the telecommunications world due to the numerous deficiencies of this model, the Commission should ensure that this model does not spread to broadband Internet service. Thus, Vonage renews its request that the Commission establish a separate rule that: "Subject to reasonable network management, a provider of broadband Internet access may not charge a content, application, or service provider for access to the subscribers of the broadband Internet access provider."

Allowing broadband Internet access providers to impose any tolls on access to customers – whether for "prioritized" access or "plain old" access – would stifle competition, limit innovation, and suppress investment, just as the Commission has suggested.[172] Not only would such fees "reduce the potential profit that a content, application, or service provider can expect to earn and hence reduce the provider's incentive to make future investments in the quantity or

[171] NPRM, at ¶ 106.

[172] *Id*. at ¶ 68.

quality of its content, application, or service,"[173] but the uncertainty surrounding when they would apply and the ability of network operators to impose (and increase) them arbitrarily would have a severe detrimental impact on investment in content, application, and service providers. Investors would be reluctant to put funds into even the most successful and otherwise stable Internet-related content provider if network operators can suddenly erect a "toll booth" so that a consumer who already *pays the network operator for Internet access* is unable to access that particular provider's content unless the provider also pays. The threat is even more insidious where vertical innovation and service convergence give network operators the incentive to foist costs upon and minimize consumer access to competing content, application, or service providers.

By contrast, Verizon's arguments that it should be free to impose such charges at its pleasure border on the absurd. For example, Verizon claims that a rule such as that advocated by Vonage could limit a broadband Internet access provider's ability to offer a discount to an end user who posts videos on YouTube, because that end user could be considered a "content provider."[174] Such an "analogy" takes the rule to its illogical extreme. The subscriber in that case is *already paying Verizon a fee for Internet access*; her very ability to post the video to the Internet in the first instance is derived from her retail relationship with Verizon and the Internet access that Verizon provides as a result of that arrangement. Thus, there would be no reason to consider the subscriber as anything other than an end user, and Verizon could then presumably offer that subscriber any and all promotional discounts it wishes.

---

[173] *Id.*

[174] Verizon Comments at 70.

Also, Verizon asserts that an "access charge" prohibition such as that suggested above would result in all network costs being recovered from end users.[175] This argument misses the mark in several respects. First, consumers *already pay Verizon for Internet access* – under that contractual arrangement, the consumer commits to pay Verizon a sum certain for Internet access and Verizon in turn commits to provide the consumer a service of a certain advertised (or actual) speed to connect to wherever the consumer wants to go on the Internet. Thus, the consumer – *Verizon's customer* – is the one who chooses where to go and he or she already pays Verizon for the right to get there. Second, Verizon forgets that every Internet transmission has two ends. While Verizon's customer is paying for access to Verizon's network (for example) to send packets, the service provider at the other end is paying for access to some network to receive those packets, and the networks already pay each other (or have other arrangements) for delivering packets over each other's networks, so Verizon is already recovering its network costs both from end users and from other networks with which it interconnects. Verizon wants to force service providers to pay *twice* for Internet access, once to their own network provider and again to Verizon for access to its subscribers. Third, if "access charges" were imposed, it is not as if those costs would simply disappear into the ether. To the contrary, if Verizon were able to impose a fee on a content provider for each Verizon subscriber who chose to visit that content provider's website, the content provider would almost certainly at some point have to consider either a general price increase or a special surcharge imposed only on Verizon customers. Thus, the argument that the consumer will bear the cost of access charges is really nothing more than an argument about whether the consumer *already pays* in the form of its Internet access subscription or whether, as Verizon and others would have it, the consumer *should be required to pay more* to access certain Internet destinations.

[175] *Id*. at 71.

Finally, Verizon raises a bizarre analogy between broadband Internet access providers subject to an access charge prohibition and magazine publishers who would be barred from charging advertisers and would instead be required to recover all costs from subscriptions.[176] This comparison is patently absurd, as broadband Internet access providers sit in a markedly different position than the magazine publisher. (A better analogy would be the Postal Service *charging advertisers* to deliver the magazines containing their advertisements, while also collecting postage from the magazine publisher.) With a magazine, the consumer *expects to receive limited content* – that content chosen by the publisher. The consumer buys the magazine assuming that the advertising subsidizes the consumer's ability to view content pre-selected by the publisher. By contrast, when a consumer buys broadband Internet access service, he or she does not expect that the broadband Internet access service provider will limit in any way the content available through that connection or that *payments that may or may not be made by someone else* (such as a content provider) could affect the Internet destinations that the consumer can reach. Instead, the consumer's expectation is that for the fee paid to a provider like Verizon *by the consumer himself*, he will be able to view or use any and all content, applications, and services of his choosing. Verizon's arguments with respect to a prohibition on "access charges" therefore fail in light of the consumer expectations that are once again the touchstone of this proceeding.

[176] *Id*. at 71-72.

V. CONCLUSION

For the foregoing reasons, the Commission should adopt its proposed rules, as further modified pursuant to the recommendations made by Vonage herein and in its initial Comments in this proceeding. A copy of the proposed rules reflecting the modifications suggested by Vonage is provided as Attachment 1 hereto.

Respectfully submitted,

/s/ Brendan Kasper
Brendan Kasper
Senior Regulatory Counsel
Vonage Holdings Corp.
23 Main Street
Holmdel, New Jersey 07733
(732) 444-2216

Dated: April 26, 2010

ATTACHMENT 1

Proposed Rules with Vonage Revisions

§ 8.1 Purpose and Scope.

The purpose of these rules is to preserve the open Internet. These rules apply to broadband Internet access service providers only to the extent they are providing broadband Internet access services.

§ 8.3 Definitions.

Internet. The system of interconnected networks that use the Internet Protocol for communication with resources or endpoints reachable, directly or through a proxy, via a globally unique Internet address assigned by the Internet Assigned Numbers Authority.

Broadband Internet access. Internet Protocol data transmission between an end user and the Internet. For purposes of this definition, dial-up access requiring an end user to initiate a call across the public switched telephone network to establish a connection shall not constitute broadband Internet access.

Broadband Internet access service. Any communication service by wire or radio that provides broadband
Internet access directly to the public, or to such classes of users as to be effectively available directly to
the public.

Reasonable network management. Reasonable network management consists of:

(a) reasonable practices employed by a provider of broadband Internet access service to:

(i) reduce or mitigate the effects of congestion on its network or to address quality-of-service
concerns;

(ii) address traffic that is unwanted by users or harmful;

(iii) prevent the transfer of unlawful content; or

(iv) prevent the unlawful transfer of content; and

(b) other reasonable network management practices.

§ 8.5 Content.

Subject to reasonable network management, a provider of broadband Internet access service may not prevent **or hinder** any of its users from sending or receiving the lawful content of the user's choice over the Internet.

§ 8.7 Applications and Services.

Subject to reasonable network management, a provider of broadband Internet access service may not prevent **or hinder** any of its users from running the lawful applications or using the lawful services of the user's choice.

§ 8.9 Devices.

Subject to reasonable network management, a provider of broadband Internet access service may not prevent **or hinder** any of its users from connecting to and using on its network the user's choice of lawful devices that do not harm the network.

§ 8.11 Competitive Options.

Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user's entitlement to competition among network providers, application providers, service providers, and content providers.

§ 8.13 Nondiscrimination.

Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.

§ 8.14 Access Charges.

Subject to reasonable network management, a provider of broadband Internet access may not charge a content, application, or service provider for access to the subscribers of the broadband Internet access provider.

§ 8.15 Transparency.

~~**Subject to reasonable network management, a**~~ **A** provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.

§ 8.19 Law Enforcement.

Nothing in this part supersedes any obligation a provider of broadband Internet access service may have—or limits its ability—to address the needs of law enforcement, consistent with applicable law.

§ 8.21 Public Safety and Homeland and National Security.

Nothing in this part supersedes any obligation a provider of broadband Internet access service may have—or limits its ability—to deliver emergency communications or to address the needs of public safety or national or homeland security authorities, consistent with applicable law.

§ 8.23 Other laws.

Nothing in this part is intended to prevent a provider of broadband Internet access service from complying with other laws.

ATTACHMENT 2

WILTSHIRE & GRANNIS LLP

1200 18TH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW. WILTSHIREGRANNIS.COM

ATTORNEYS AT LAW

January 27, 2010

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Comment Sought on the Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan, NBP Notice #19, GN Docket Nos. 09-47, 09-51, and 09-137

Dear Ms. Dortch:

As discussed in the *ex parte* letter filed January 13, 2009 and its comments filed December 7, 2009, Vonage believes that deployment of broadband is an important goal for the Commission to pursue, and Vonage supports the creation of a broadband support mechanism as part of the Universal Service Fund ("USF").[1] To maximize the effectiveness of such a program, the Commission should require recipients of broadband funding to offer standalone broadband service—that is, broadband offered separately from voice or video service. At the January 12, 2010 meeting, Commission staff asked Vonage to elaborate on the Commission's authority to establish a broadband funding mechanism under the Telecommunications Act of 1996.[2] This *ex parte* letter responds to that request.

The Commission may, and indeed under the 1996 Act it should, establish a universal service support program to encourage the deployment of broadband to the Nation. The purpose of the USF program—and in particular, the "High Cost Fund"—has been to promote the

[1] Vonage remains deeply concerned about the growth of the USF, and urges the Commission to take this step in conjunction with comprehensive reforms to control the size of the Fund.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

availability in rural, insular, and high-cost areas of services that are readily available to other Americans, ensuring that no American is left behind and that all Americans reap the benefits of universal service.[3] It would undermine that purpose to read the Act so narrowly that it would prevent consumers from gaining access to the modern communications technologies that are available to most Americans—technologies that are increasingly being used to deliver communications services.

Prior to the 1996 Act, the FCC and state regulatory bodies promoted universal service through a combination of explicit and implicit subsidies at both the federal and state levels.[4] Implicit subsidies, of course, were well suited to an era of monopoly. But Congress understood that with the advent of competition that the 1996 Act was intended to promote, implicit subsidies would need to be replaced by explicit support mechanisms. And so Congress provided for the creation of such mechanisms in section 254 of the Act.[5]

Congress did not, however, intend in the 1996 Act to oust the FCC from its traditional role as the regulator responsible for federal universal service policy. Rather, Congress conferred upon the Commission, in consultation with a new Federal-State Joint Board, the authority to set federal universal service policy consistent with several enumerated principles.[6] Those principles include:

> (1) Quality and rates -- Quality services should be available at just, reasonable, and affordable rates.
>
> (2) Access to advanced services -- Access to advanced telecommunications and information services should be provided in all regions of the Nation.
>
> (3) Access in rural and high cost areas -- Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.[7]

---

[3] *See, generally*, 47 U.S.C. § 254; *Rural Broadband Report*, Public Notice, 24 FCC Rcd 12791, 12850-53 ¶¶ 126 & nn.324-27, 134 & nn.349-50 (2009).

[4] *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8784 ¶ 10 (1997) ("*First Order*").

[5] 47 U.S.C. § 254(b)(5), (e).

[6] *Id*. § 254(a), (b), (c).

[7] *Id*. § 254(b)(1)-(3).

Underlining the breadth of the discretion the Commission was intended to exercise, Congress further provided that the Joint Board and the FCC were not confined merely to advancing the principles identified by Congress, but were instead empowered to identify additional principles that universal service policy should support.[8]

Congress, in drafting the Act, was cognizant of the fact that the Nation was undergoing a communications revolution, of which the 1996 Act would be only one part. AT&T had been broken up just over a decade ago, leading to competition in the long distance market. New wireless carriers were obtaining spectrum and cell phones would soon go from being luxuries to being commonplace. And, of course, the World Wide Web was in its infancy, with companies like Yahoo! having just recently been formed.

Recognizing that it could not predict what communications would look like in the future, Congress did not enumerate the services eligible for universal service support. Instead, it left to the Commission the duty to define those services in consultation with the Joint Board. Congress made the breadth of this delegation explicit by adopting an initial definition of universal services that is merely a definition "[i]n general."[9] The very next provision provides for "[a]lterations and modifications" to the definition of services supported by the USF.[10] The initial definition speaks of "telecommunications services," but simultaneously defines universal service as "evolving" and directs the Commission to "tak[e] into account advances in telecommunications and information technologies and services."[11] Just as it did in enumerating the principles to guide the Commission in establishing USF policy, Congress emphasized that those who receive services supported by USF should not be left behind other Americans, relegated to using outdated technology and deprived of access to advanced services. Rather, Congress directed the Commission to consider four criteria in deciding how that definition should evolve over time, including whether services "are essential to education, public health, or public safety," are being deployed in public telecommunications networks, and are consistent with the public interest.[12]

Pursuant to the mandate to periodically reevaluate the services that should be supported by USF mechanisms, the Commission can—and should—decide that broadband service should be a supported service. As the Commission has explained, "[h]igh-speed ubiquitous broadband

---

[8] *Id.* § 254(b)(7). The Joint Board and the Commission did so at their first opportunity, establishing competitive neutrality as a guiding principle for the universal service program. *See First Order*, 12 FCC Rcd at 8789-90 ¶ 21.

[9] 47 U.S.C. § 254(c)(1).

[10] *Id.*§ 254(c)(1)..

[11] *Id.* § 254(c)(1). The change in the nature of communications since the Act has been remarkable. In the Commission's first order defining supported services, it determined that single-party calling was a service eligible for support, and a service that eligible carriers would be required to provide. *See First Order*, 12 FCC Rcd at 8790 ¶ 22. Yet the Commission realized that carriers would need time to upgrade networks, even by 1996, to provide single-party calling. *See id*.

[12] *See* 47 U.S.C. § 254(c)(1).

can help to restore America's economic well-being and open the doors of opportunity for more Americans, no matter who they are, where they live, or the particular circumstances of their lives. It is technology that intersects with just about every great challenge facing our nation."[13] In light of this policy conclusion, there can be little question that broadband services are essential to education, public health, and public safety, and are necessary to advance the "the public interest, convenience, and necessity."[14]

Out of an abundance of caution, some parties have urged the Commission to request that Congress explicitly affirm that the Commission has the authority to create a separate broadband support mechanism.[15] Vonage believes that it would be prudent to remove any question regarding the Commission's authority in this regard, and would support the Commission in such a request. Yet the Commission need not wait for Congress to act because the current language of section 254 permits the Commission to include broadband as a supported service.

The FCC and state regulators had been helping to promote universal service for decades.[16] Congress gave no hint in the 1996 Act that it wanted to displace those regulators from their roles or that it wanted to impose new statutory limits on the FCC's authority to determine universal service policy or decide what services would be eligible for support. Indeed, the opposite is true. Far from trying to specify which types of services or technologies would be eligible for support, Congress was quite clear that the Commission would retain this authority—along with its authority to set universal service policy generally—in consultation with the Joint Board. To the extent Congress expressed any view about what that definition should include, Congress indicated that the definition of universal service should evolve over time and should reflect the current state of technology.[17] Congress also provided that the Commission, in establishing USF policy, should be guided by the principles that advanced services be provided

---

[13] *A National Broadband Plan for Our Future,* Notice of Inquiry, 24 FCC Rcd 4342, 4343 ¶ 1 (2009).

[14] 47 U.S.C. § 254(c)(1)(D). Congress has recently reemphasized the importance of broadband deployment to the public interest. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001, 123 Stat. 115, 512 (codified at 47 U.S.C. § 1305).

[15] *See, e.g.*, Comments of Rural Independent Competitive Alliance at iii, GN Docket Nos. 09-47, 09-51, and 09-137 (filed Dec. 7, 2009); Reply Comments of Public Knowledge at 34, GN Docket No. 09-51 (filed July 21, 2009).

[16] Indeed, when the Commission established the USF as an explicit, separate program, to "ensure that telephone rates are within the means of the average subscriber in all areas of the country," *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board,* Decision and Order, 96 F.C.C. 2d 781, 795 ¶ 30 (1984), the D.C. Circuit held that the program was a proper use of the Commission's ancillary jurisdiction to further the goal of "mak[ing] available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, . . . wire and radio communication service with adequate facilities at reasonable charges." *Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1311 (D.C. Cir. 1988) (citation omitted).

[17] 47 U.S.C. § 254(b)(2), (3).

in all areas of the Nation and that consumers in rural, insular, and high-cost areas should have access to the same kinds of services that consumers in urban areas have.[18]

It would be contrary to the express will of Congress to view section 254(c)(1)'s use of the term "telecommunications service" in this context as somehow overriding the remainder of section 254, limiting the services eligible for support to old technologies, prohibiting support for advanced services commonly available to consumers in urban areas. Congress has consistently acted to ensure access to such advanced services, including as part of the recent Recovery Act the requirement that the FCC establish a plan for ensuring broadband access to "all people of the United States"[19]—the very requirement that led to the public notice to which Vonage responded in this proceeding.

The most that can be said for the argument against a broadband-only support mechanism is that the statute is ambiguous. In this circumstance, "the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties."[20] Under *Chevron*,[21] the Commission has the authority, as the agency charged with administering the Act, to resolve any ambiguities in the statute in favor of increased broadband deployment. [22]

The requirement proposed by Vonage that recipients of broadband funding offer standalone broadband does not change the analysis. As Vonage has previously explained, requiring carriers receiving broadband support to offer broadband on a standalone basis will help to advance the statute's goals and also make the most effective use of USF monies.[23]

---

[18] *See id*. § 254(b).

[19] American Recovery and Reinvestment Act of 2009 § 6001(k)(2) (codified at 47 U.S.C. § 1305(k)(2)).

[20] *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 501-502 (2002) (citation omitted).

[21] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[22] *Cf. Rural Cellular Ass'n v. FCC*, No. 08-1284, 2009 U.S. App. LEXIS 26976, at *13 (D.C. Cir. Dec. 11, 2009) ("Since the principles outlined [in § 254(b)] use 'vague, general language,' courts have analyzed language in § 254(b) under *Chevron* step two.") (quoting *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 421 (5th Cir. 1999)); *WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1273 (10th Cir. 2007) (discussing sections 254(e) and 214 and noting that "[t]he FCC's interpretation of the Telecommunications Act's provisions addressing state ETC designations is, of course, subject to [*Chevron*] deference") (citation omitted).

[23] *See* Comments of Vonage Holdings Corp. at 2, GN Docket Nos. 09-47, 09-51, and 09-137 (filed Dec. 7, 2009); *see also* Ex Parte Notice from Brita D. Strandberg, Counsel for Vonage Holdings Corp., to Marlene Dortch, Secretary, Federal Communications Commission 1-2, GN Docket Nos. 09-47, 09-51, and 09-137 (filed Jan. 13, 2010). *See also* 47 C.F.R. § 54.201.

Accordingly, the Commission should create a broadband funding support mechanism and should require carriers receiving such funding to offer broadband service on a standalone basis.[24]

If you have any questions or require any additional information, please do not hesitate to contact me at (202) 730-1346.

Respectfully submitted,

Brita D. Strandberg
Counsel for Vonage Holdings Corp.

cc: Amy Bender
Rebekah Goodheart
Tom Koutsky
Vickie Robinson

[24] A second possible objection to a broadband support mechanism might focus on section 254(e), which provides that "only an eligible telecommunications carrier designated under section 214(e) . . . shall be eligible to receive specific Federal universal service support." 47 U.S.C. § 254(e). But section 254(e) only limits funding to entities properly designated under section 214(e). That section, in turn, explains that an "eligible telecommunications carrier" is simply a "common carrier" meeting certain eligibility criteria. *See* 47 U.S.C. § 214(e)(1). Because common carriers offer information services, and nothing in section 214(e) limits the types of services that can be supported by USF section 214(e), this does not bar the Commission from supporting information services under section 254.